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In the Supreme Court of the United States.

OCTOBER TERM 1898.

No. 49.

MARTIN F. MORRIS ET AL., APPELLANTS,

vs.

THE UNITED STATES.

Brief and Argument for the United States.

STATEMENT OF THE CASE.

By the River and Harbor Act of August 2, 1882, (22 Stats., 198), an appropriation of four hundred thousand dollars ($400,000), was made for—

> "improving the Potomac River in the vicinity of Washington with reference to the improvement of navigation, the establishment of harbor lines, and the raising of the flats, under the direction of the Secretary of War, and in accordance with the plan and report made in compliance with the River and Harbor Act approved March 3, 1881, and the reports of the Board of Engineers made in compliance with the resolution of the Senate of December 13, 1881."

The act made it the duty of the Attorney General to examine all claims of title to the premises to be improved under this appropriation, and to institute a suit or suits at law or in equity—

> "against any and all claimants of title under any patent which in his opinion was by mistake or was

> improperly or illegally issued for any part of the marshes or flats within the limits of the proposed improvement."

From the provisions of this act—

> "it is manifest that Congress assumed that the title to all the land and water within the limits of the proposed improvement was paramount in the United States."
>
> United States *v.* Morris, 6 Mackey, 94.

By other acts of Congress further appropriations were made for continuing the improvement; the entire sum appropriated for and expended upon the work is two million two hundred and eighty-five thousand dollars; in its prosecution channels have been dredged, sea walls constructed, and a large area reclaimed from the river.

The progress of the work prior to the filing of the bill of complaint is shown in Annual Reports for the years 1883, 1884, and 1885—

> "upon the improvement of the harbors of Washington and Georgetown, and of the Potomac River in the vicinity of Washington, District of Columbia,"

made to the Chief of Engineers by Major Hains, the engineer officer in charge, and which reports are incorporated in the Annual Reports of the Chief of Engineers for said years, as Appendix I, J, and J, respectively. (Exhibits U. S., 3, 4, 5, Record, Vol. 5, p. 51.)

After the passage of the act of 1882 it transpired that claims to the premises being improved under it, or to parts of them, were being made by the Chesapeake and Ohio Canal Company and numerous other corporations and persons, which claims had a different origin from the patent mentioned in the act.

This led to the passage of the act of Congress entitled—

"An act to provide for protecting the interests of the United States in the Potomac River Flats, in the District of Columbia,"—

approved August 5, 1886, (24 Stats., 335), of which "Exhibit A" to the bill of complaint is a copy.

By the first section of this act it was made the duty of the Attorney General—

> "to institute, as soon as may be, in the Supreme Court of the District of Columbia, a suit against all persons and corporations who may have, or pretend to have any right, title, claim, or interest in any part of the land or water in the District of Columbia within the limits of the City of Washington, or exterior to said limits and in front thereof toward the channel of the Potomac River, and composing any part of the land and water affected by the improvements of the Potomac River or its flats in charge of the Secretary of War, for the purpose of establishing and making clear the right of the United States thereto."

By the second section it was provided that the suit—

> "shall be in the nature of a bill in equity, and there shall be made parties defendant thereto all persons and corporations known to set up or assert any claim or right to or in the land or water in said first section mentioned, and against all other persons and corporations who may claim to have any such right, title, or interest. On the filing of said bill process shall issue and be served, according to the ordinary course of said court, upon all persons and corporations within the jurisdiction of said court; and public notice shall be given by advertisement in two newspapers published in the City of Washington for three weeks successively of the pendency of said suit, and citing all persons and corporations interested in the subject matter of said suit, or in the land or water in this act mentioned, to appear, at a day named in such notice, in said court, to answer the said bill and set forth and maintain any right, title, interest or claim that any person or corporation may have in the premises, and the court may order such further notice as it shall think fit to any party in interest."

The third section gives the court—

> "full power and jurisdiction by its decree to determine every question of right, title, interest, or claim arising in the premises, and to vacate, annul, set aside, or confirm any claim of any character arising or set forth in the premises; and its decree shall be final and conclusive upon all persons and corporations parties to the suit, and who shall fail, after public notice as hereinbefore in this act provided, to appear in said court and litigate his, her, or its claim, and they shall be deemed forever barred from setting up or maintaining any right, title, interest, or claim in the premises."

The present suit was instituted under this act, which "may well be regarded as supplementary to the original act."

United States *vs.* Morris et al., 6 Mackey, 95.

As to all the defendants, except those claiming under a certain patent issued through the General Land Office to John L. Kidwell in 1869, the bill states that—

> "the complainant is not sufficiently informed as to the nature and extent of said claims, or any of them, to set them out with particularity; and the complainant leaves them to present their claims in their answer hereto as they may be advised."

As to the claims under said patent, the bill avers the patent to be void upon several grounds, and the claims, therefore, unfounded, and prays that the patent may be canceled and annulled.

The bill further states that—

> "the complainant disclaims in this suit seeking to establish its title to any of the wharves included in the area described in paragraph 3 of this bill, and claims title only to the land and water upon and in which said wharves are built, leaving the question of the ownership of the wharves proper, where that is a matter of dispute, to be decided in any other appropriate proceeding."

The limits of the "land and water" affected by the improvements, as certified by the Secretary of War (Record, Vol. 5, p. 1), are specifically set forth in the third paragraph of the bill of complaint, and are shown by the heavy black lines upon the map filed as "Exhibit B" to the bill. The beginning of said limits is at the southeast corner of square south of Square 12, and they proceed thence along the east line of said square and the west line of Twenty-sixth street to the line of the Chesapeake and Ohio Canal bank; thence, by several courses and distances, "along the canal bank, parallel to and about ten feet southwest of a row of sycamore trees," and following the shore line of the river to the southwest line of Virginia avenue between Seventeenth and Eighteenth streets west; thence southeasterly along the southeast line of said avenue to the east line of Seventeenth street west, being the west line of Reservation 3 (known as the Monument Grounds); thence to the crest of the bank forming the southwestern boundary of said Reservation 3, and along said crest to the southwestern corner of square 233, at the intersection of Fifteenth street west and Water street; thence across Fourteenth street west and Maryland avenue to a point in the middle of E street south; thence to the nearest point in the shore line of the river; thence with said shore-line to Greenleaf's Point at the southern extremity of the Arsenal Grounds; the line proceeds thence along the east side of the Washington channel of the Potomac River and across the mouth of the Eastern Branch in a southerly direction to the wharf at Giesboro Point; thence across the main or Virginia channel of the Potomac River in a westerly direction to the west side of that channel; thence along the west side of that channel in a northwesterly direction and following the meanders of the channel to a point opposite the wharf known as Easby's wharf; thence across the channel to the southwest corner of said wharf, and thence along the south side of said wharf to the southwest line of square south of Square 12; and thence

along said southwest line to the place of beginning at the southeast corner of said square.

The area of actual reclamation of land from the bed of the river within said limits under the above-mentioned legislation, amounting to nearly seven hundred and fifty (750) acres, is shown by the dotted black line on said map.

Claims and pretensions of various kinds to the land and water within said limits, or to portions of the same, are set up in the answers of the parties who were originally made defendants to the bill and of those who have appeared in response to the public notice of the pendency of the suit given in accordance with the terms of the act.

These claims, with respect to the nature of the several issues involved in them, admit of convenient division into seven classes, viz:

I.

The claim made by the heirs of James (M.) Marshall and those of his brother, Chief Justice John Marshall, to the ownership of the entire bed of the river from shore to shore (including therein the reclaimed land) under grants from the crown of England to Lord Culpeper, and others, for what is known as the Northern Neck of Virginia, and the deed from Denny Martin Fairfax, as said Culpeper's successor in title, to said James (M.) Marshall; and the claim made by the said heirs of James (M.) Marshall to such ownership under the patent to Lord Baltimore for the Province of Maryland, and the deed to them from Frederick Paul Harford as Lord Baltimore's successor in title.

II.

The claims of ownership made to part of the reclaimed land by certain defendants, who assert title under a patent issued by the United States through the General Land Office to John L. Kidwell in the year 1869 for forty-seven and seventy-one one-hundredths ($47\frac{71}{100}$) acres and to one hun-

dred and fifty (150) acres of alleged accretion thereto; and to another tract, the area of which is not stated, adjoining the Long Bridge and extending therefrom southwardly between the Washington and Georgetown channels, of which latter tract they claim to be the equitable owners under an application for a patent made by said Kidwell in 1871.

III.

The claims made by the Chesapeake and Ohio Canal Company and its lessee, Henry H. Dodge, to riparian rights from Easby's Point to Seventeenth street west.

IV.

The claims to riparian rights, right of access to the channel of the river, and to accretions, natural and artificial, made by the owners of lots in squares along the river west of Seventeenth street west, namely, Squares 148, 129, 89, 63, 22, and Square south of Square 12.

V.

The claim made by certain of the descendants of Robert Peter, an original proprietor of lands in the city of Washington, to certain land near the public reservation known as the Observatory Grounds.

VI.

The claims to riparian privileges and wharfing rights made by owners of lots in squares beginning with Square 233 and extending to the line of the Arsenal grounds.

VII.

The claims made by certain persons occupying wharves below the Long Bridge under licenses from the Chief of Engineers of the United States Army.

The above classification was followed in the argument of the case in the court below and in the treatment of the case

in the opinion of the court which was delivered by Mr. Justice Hagner (Record, Vol. 7, p. 2469), and the same order will be followed in this brief.

The opinion of the court below is a lucid and convincing exposition of every material point in the case, and may well be relied on as an unanswerable demonstration of the correctness of the conclusions reached as to the public rights in the premises. In support of these conclusions counsel can expect to add but little "to the force of the reasoning and the legal learning" displayed in that opinion. The Record in the case consists of a number of volumes, and in the discussion references to facts contained in them, and citations of authorities, must be numerous; they feel that the utmost to be accomplished by them in this brief is by the inclusion under appropriate heads of apt extracts from both to relieve this tribunal from the labor involved in the frequent handling of the volumes of the Record and of the reports.

The individual claims of the several defendants will be more specifically set forth in the portions of this brief devoted to the consideration of the above-mentioned classes respectively.

The main determination by the court "of rights drawn in question" in the suit was by the decree passed October 17, 1895. (Record, Vol. 7, p. 2548.)

This decree adjudicated all points in controversy in favor of the United States.

Certain lots and parts of lots in the Squares 63, 89, 129 and 148, north of their boundaries on Water street and A street, which were subject to the ebb and flow of the tide, were necessarily included in the work of reclamation; and, as to the said lots and parts of lots in said squares, the decree held the owners to be entitled to compensation for the taking and inclusion of the same in the improvements.

By the first paragraph of said decree the claims under class 2, that is, those set forth in the answers of certain

defendants founded upon a patent issued to John L. Kidwell in 1869, for a tract of forty-seven and seventy-one one-hundredths ($47\frac{71}{100}$) acres in the Potomac River, and alleged accretion thereto, and, also to a tract adjoining the Long Bridge, founded upon an application for a patent therefor, made by said Kidwell in 1871, are held and declared to be "invalid, void and of none effect;" and the said patent is "vacated, annulled and set aside."

By the second paragraph—

> "the claims of each and all of the other parties defendants, set forth in their respective answers, to any rights, titles and interests, riparian or otherwise, in the said lands or water,"

are held and declared "to be invalid, void and of none effect," except as to the parties owning said lots and parts of lots in the squares last mentioned.

By the third paragraph it is held and declared—

> "that there does not exist (except as aforesaid) any right, title, or interest in any person or corporation, being a party to this cause, to or in any part of the said land or water,"

and

> "that the right and title of the said United States (except as aforesaid) to all the land and water included within the limits of the said improvements of the Potomac River and its flats, as the said limits are described in the said bill of complaint,"

is absolute

> "as against all the defendants to this cause, and as against all persons whosoever claiming any rights, titles or interests therein who have failed to appear and set forth and maintain their said rights, titles or interests as required by said act of Congress."

By the fourth paragraph it is held that the defendants who are owners of the lots or parts of lots in Squares 63, 89, 129 and 148—

> "which are included between the north line or lines of the said improvements of the Potomac river and its flats, and the north line or lines of Water street and A street, as the said line or lines are indicated and shown on the plat called 'Exhibit B' to the said bill of complaint and on the plat called 'Exhibit G. P. No. 11,' to the testimony, are entitled to be indemnified for whatever impairment or injury may have been caused to their respective rights, titles or interests in said lots or parts of lots by the taking of the same by the United States; the value of such rights, titles, interests or claims to be ascertained by this court, exclusive of the value of any improvement of the said lots or parts of lots made by or under the authority of the said United States."

By the fifth and last paragraph of the decree the taking of further testimony was authorized, on behalf of the owners and on behalf of the United States, as to the respective areas of the said lots and parts of lots, to be computed according to the map or plan of the city of Washington with reference to which Exhibit G. P. No. 11 was prepared, and of and concerning the true ownership and value of the said lots and parts of lots.

Such testimony as to ownership, areas and values having been taken and returned, the court upon consideration thereof and on March 2, 1896, passed a further and supplementary decree adjudging the values of the said lots and parts of lots so taken to be ten cents per square foot, and payment was directed to be made to sundry persons whom the court found to be the owners of certain of the parcels; the ownership of the remaining parcels not being, in the opinion of the court, sufficiently established, the taking of further testimony with respect thereto was ordered. The total amount of said values found by the court is $26,684.09. The opinion of the court upon the question of such ownership, areas, and values, and the said decree of March 2, 1896, will be found at pp. 2709 and 2714 in volume 7 of the Record.

The court having made a report of its action in the premises to Congress, agreeably to the requirements of the act of August 2, 1886, an appropriation was made for the payment of the sums so found to be due to the owners of the said lots and parts of lots in said squares; and with two exceptions, namely, Richard J. Beall and the trustees of the estate of William Easby, deceased, the several owners of the property applied, under said appropriation act, to the court for payment to them of the respective sums found to be due to them, and the fund has been very largely disbursed under orders of the court passed on said applications.

From the main decree of October 17, 1895, appeals have been taken as follows:

1. By all of the defendants embraced in class one (1), namely, the heirs of James (M.) Marshall and the heirs of his brother, Chief Justice John Marshall.

2. By all of the defendants embraced in class two (2), claiming under the Kidwell patent, etc., namely, Martin F. Morris, Henry Wells, Edward H. Wilson, Catherine A. Kidwell, Emma McCahill, John W. Kidwell, Francis L. Kidwell, Ida Hyde, and George A. Hyde.

3. By one of the defendants embraced in class three (3), namely, The Chesapeake and Ohio Canal Company and its trustees.

4. By two of the defendants embraced in class four (4), namely, the trustees of the estate of William Easby, deceased, and Richard J. Beall.

5. By all of the defendants embraced in class five (5), namely, certain descendants of Robert Peter.

6. By certain of the defendants embraced in class six (6), namely: (*a*) Charles Chauncey Savage et al.; (*b*) The Washington Steamboat Company, limited; (*c*) Avarilla Lambert, et al.; (*d*) William W. Rapley; (*e*) Mary A. S. Kimmell Gray; (*f*) James F. Barbour et al.; (*g*) William G. Johnson, assignee of the American Ice Company; (*h*) Thomas

W. Riley; (*i*) Edward M. Willis; (*j*) Annie E. Johnson, widow, sole executrix and devisee of E. Kurtz Johnson, deceased, et al; (*k*) Elizabeth K. Riley, in her own right and as trustee and executrix of William R. Riley, deceased; (*l*) The Great Falls Ice Company; (*m*) Daniel S. Evans; (*n*) Margaret J. Stone; and (*o*) Charles B. Church et al.

7. By certain of the defendants embraced in class seven (7), namely, Annie E. Johnson, widow, sole executrix and devisee of E. Kurtz Johnson, deceased, et al.; Charles B. Church et al.; Daniel S. Evans, and Willliam W. Rapley.

The grounds upon which the claims of the several appellants are based will be more particularly stated in the portions of this brief devoted to the consideration of the particular class within which they fall.

CLASS 1.

The claim made by the heirs of James (M.) Marshall, and those of his brother, Chief Justice John Marshall, to the ownership of the entire bed of the river from shore to shore (including therein the reclaimed land) under grants from the crown of England to Lord Culpeper, and others, for what is known as the Northern Neck of Virginia, and the deed from Denny Martin Fairfax, as said Culpeper's successor in title, to said James (M.) Marshall; and the claim made by the said heirs of James (M.) Marshall to such ownership under the patent to Lord Baltimore for the Province of Maryland, and the deed to them from Frederick Paul Harford as Lord Baltimore's successor in title.

In the joint answer of the heirs of James (M.) Marshall (Record, Vol. 1, p. 66), they aver that—

> "they are the sole owners in fee-simple of all the lands embraced in said act and in said bill."

And that—

> "they have absolute property, seisin and possession, of the land in controversy in this suit, because the same is part and parcel of the waste and unappropriated lands of the Northern Neck."

In deducing the title thus claimed they aver that by grants from Kings Charles II and James II and by purchase Thomas (Lord) Culpeper became the owner of the tract known as the Northern Neck (of Virginia); that the title of said Lord Culpeper passed to Thomas (Lord) Fairfax as heir-at-law, who devised to his nephew, Denny Martin, upon condition that he take the name of Fairfax; that Denny Martin did take the name of Fairfax, and that his title under the devise was confirmed by the decision of this

court in Fairfax's Devisee *vs.* Hunter's Lessee, 7 Cranch., 603; and that said Denny Martin Fairfax, by indenture dated August 30, 1797, conveyed to James (M.) Marshall, the ancestor of said defendants, all his (grantor's) remaining interest in lands in said tract with certain exceptions, which do not include any portion of the land and water involved in this suit.

In an amended and supplemental answer (Record, Vol. 1, p. 332) said defendants set up a title alleged to have been derived from another source (the patent to Lord Baltimore for Maryland), saying—

> "These respondents recognizing the fact that from the time of the grant of the Northern Neck, which in express terms embraced the Potomac river, there had been continual disputes and controversies between those claiming under 'the Baltimore patent' and those claiming under 'the Culpeper patent' with respect to the ownership of said river, went diligently to work to discover the heirs or devisees of Henry Harford, who was Lord Proprietary of Maryland at the commencement of the Revolutionary war, in order that a compromise and adjustment might be made which would settle the disputed title to the said river. The title to the Potomac river and to the soil and water thereof 'to the further bank,' having been asserted and claimed by Cecilius Calvert, Baron of Baltimore, and those who succeeded him as Lords Proprietors of Maryland, under and by virtue of the patent or charter of Maryland granted to Cecilius Calvert, Baron of Baltimore, by Charles the First, King of Great Britain, etc., in the eighth year of his reign (which said patent or charter is prayed to be read as part of this answer), and the claim or title thereof having passed by regular legal succession, by descent or purchase, to Frederick Henry Harford, hereinafter mentioned.
>
> "These respondents, after much pains and trouble, have ascertained that the said Henry Harford, 'Lord Proprietary' of Maryland, departed this life in Great Britain on the 8th day of December, 1834, having first

made and published his last will and testament, by which he bequeathed and devised to his son, Frederick Paul Harford, 'all the rest, residue, and remainder of his real and personal estate whatsoever, wheresoever and of whatever nature and kind the same might be;' which included the property or claim in controversy in this cause. That the said Frederick Paul Harford died 21st February, 1860, having devised all of his 'real estate whether freehold, copyhold or leasehold whatsoever and wheresoever,' which included the property or claim in controversy in this cause, after the performance of certain conditions, all of which have been performed, to his only son and heir Frederick Henry Harford.

"That the said Frederick Henry Harford, by deed bearing date the 9th day of June, 1888, which is herewith filed and prayed to be taken as part of this answer, has conveyed, released and forever quit-claimed to these respondents all right, title and interest, both at law and in equity, which he or any person or persons claiming through the said Baltimore Patent of King Charles the First might have in and to any portion of the land and water embraced between the two banks of the Potomac River, and consequently to all of the land and water embraced in the Act of Congress and in this suit."

A second amended and supplemental answer was filed by said defendants, in which (Record, Vol. 1, p. 338) they say:

"These respondents not waiving or doubting the validity of their claim or title under the Culpeper grants as against the Lord Proprietary of Maryland, the State of Maryland, or the United States, or any other person whatsoever, but, in order to remove any possible cloud or ground for objection thereto, diligently sought for, and found after long inquiry, Mr. Frederick Henry Harford, the heir-at-law and devisee of Mr. Frederick Paul Harford, who was the heir-at-law and devisee of the last Lord Proprietary of Maryland, Mr. Henry Harford, and by an arrangement with him and for valuable considerations obtained from him a deed of conveyance and trans-

fer of all his right, title and interest, at law or in equity, in and to the land and water and property in controversy."

They deny (p. 338) that the United States acquired any proprietary rights or title to the said land and water "by and through the State of Maryland," or that Maryland ever acquired any; and they aver that—

> "for a long period of time previous to the Revolutionary War there was a controversy between the proprietors of the Northern Neck of Virginia and the Lord Proprietor of Maryland as to the boundaries of their respective lands; the proprietor of the Northern Neck of Virginia claiming the whole of the Potomac River and the soil thereof to its eastern or Maryland bank under his charter, and the Lord Proprietor of Maryland claiming to the western or Virginia bank of the Potomac by virtue of the Baltimore patent. That this controversy had never been settled at the time of the confiscation acts of Maryland. That Virginia at that time claimed jurisdiction and governmental rights over the soil and persons of the Potomac River to its eastern bank, and that the boundary line between Virginia and Maryland along the Potomac River was never definitely settled until the year 1878 by the arbitration of Messrs. Black, Beck and Jenkins, when the territorial limits of the two States were fixed at low water mark on the Virginia shore. That the territorial limits of the District of Columbia, as between the United States and the State of Virginia, have never yet been determined. That whatever may have been or may be the result of the adjustment of the territorial limits of the State of Maryland or the District of Columbia, so as to give municipal jurisdiction and governmental rights, these respondents are advised that it can in no wise affect the proprietary rights, or rights of property, of themselves in and to the land and water in controversy.
>
> "These respondents further say that their rights under the patents aforesaid have been recognized by

the decisions of the courts of the State of Virginia, and are now recognized by the statutes of that State; and that their rights and claims were constantly asserted by the State of Virginia to the land and water of the Potomac River, and through and by virtue of the same patents under which they claim and assert title the State of Virginia claimed territorial jurisdiction and governmental rights over the Potomac River until the arbitration aforesaid, and that the result of that arbitration in nowise affects the title of these respondents to the part of the Potomac River and soil thereof now in controversy.

"These respondents further say that they deny the pretensions of the United States to the land and water in controversy under its claim through Maryland as having been confiscated as the property of the last Lord Proprietor, a British subject, for they say that even if this property in controversy was the property of Mr. Harford, they say that Maryland never took possession of the same either through the commissioners appointed to take possession of confiscated property or otherwise.

"These respondents, further answering, say that they deny the right of the United States in good conscience and in equity to assert any claim or title to the land and water in controversy or to claim the possession thereof as against these respondents under and through the State of Maryland by virtue of its having been the property of Mr. Harford, a British subject, confiscated in 1780 to the use of the State of Maryland by its confiscation acts of 1780, and thereafter in 1791 ceded by Maryland to the United States, because they say that after the passage of the confiscation acts by the State of Maryland in 1780, by the preliminary treaty of peace between the United States and Great Britain, concluded at Paris on the 30th of November, 1782, and proclaimed by Congress on the 11th of April, 1783, in the fifth article thereof it was agreed that Congress should earnestly recommend to the legislatures of the respective States to provide for the restitution of all the estates, rights and property which had been confiscated belonging to real British subjects, and in the sixth

article of said preliminary treaty it was provided that there should be no future confiscation of British property, and that though the same solemn provisions were made in the definitive treaty of peace between the United States and Great Britain, concluded at Paris, September the 3rd, 1783, and ratified by the Congress of the United States January 14th, 1784, by articles fifth and sixth thereof; and further, that though thereafter by a treaty of amity and commerce concluded at London on the 19th of November, 1794, between the United States and Great Britain and proclaimed February 29th, 1796, in the ninth article thereof it was agreed that British subjects might grant, sell, and devise lands held by them to whomsoever they pleased, and that neither they nor their heirs or assigns should, so far as respects said lands and the legal remedies incident thereto, be regarded as aliens, these respondents say that they are informed and are advised that the Congress of the United States never did at any time recommend to the Legislature of the State of Maryland the restitution of the property aforesaid, so said and claimed to have been confiscated; and that after the said solemn treaties of peace preliminary and definitive, the United States obtained from the State of Maryland the cession of the District of Columbia in 1791, under and by virtue of which cession they now claim title to the property in controversy, and that the same was and is the very property which the United States by its solemn treaty of peace had pledged itself to recommend to the State of Maryland to be restored, and which these respondents are informed it never did so recommend."

The heirs of Chief Justice John Marshall were made parties, after the filing of the answers above mentioned of the heirs of James (M.) Marshall, and filed an answer (Record, Vol. 1, pp. 364–5), in which they—

> "adopt the answer, amended and supplemental answers, of their codefendants, Henry M. Marshall et al. as heirs-at-law of James Marshall, so far as they

set up the legal title to the property in said bill and proceedings mentioned."

And they further aver—

"that the property named and embraced in the said assurances set up in the answer, amended and supplemental answers, of the said codefendants, Henry M. Marshall et al., was for a valuable consideration conveyed to the said James Marshall in trust for the joint use and benefit of the said John and James."

In the briefs and arguments on behalf of said defendants in the court below substantially three propositions were contended for, which will be now stated and considered in their order.

The first proposition of said defendants was:

I.

That title to the bed and the shores of the Potomac River passed to Lord Culpeper under the grants for the Northern Neck of Virginia, notwithstanding the previous grant to Lord Baltimore for the Province of Maryland; that Denny Martin Fairfax succeeded to said title, and that the same is now vested in said defendants under the deed from said Fairfax to them of August 30, 1797.

This contention involves primarily a question of territorial boundary and jurisdiction, and it is clear that neither the conveyance from Denny Martin Fairfax to James (M.) Marshall, nor that from Frederick Paul Harford to his heirs, can operate to pass title to the bed of the Potomac River, as claimed; or, to affect in any manner the paramount right of the United States thereto under the cession of territory by Maryland and the acceptance of the same by Congress pursuant to the constitutional provision relating to the location of the seat of government.

The first grant by the Crown of England for territory in America was the grant by King James I., dated May

23, 1609, to the Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony of Virginia, commonly known as the London Company. This grant was extended March 12, 1611, so as to include the islands within 300 leagues of the shore, and these charters—

> "so far as respected the rights of the company, were annulled by the judgment of the Court of Kings' Bench, on a writ of quo warranto, the effect of which was to revest in the crown the powers of government and the title to land within its limits."
>
> Johnson *vs.* McIntosh, 8 Wheat, 578.
> Marshall's Life of Washington, Vol. 1, p. 669.
> McMahon's Hist. View of Gov't of Md., p. 4, 5.
> Scharf's Hist. of Md., Vol. 1, p. 104.
> Jefferson's Notes, pp. 152–3.

The Province of Maryland formed part of the grant to the London Company, and after the annulment of the charter of that company, and on June 20, 1632, Charles I granted the letters patent to Cecilius Calvert, Lord Baltimore.

> "This grant was the first example of the dismemberment of a colony and the creation of a new one within its limits by the mere act of the crown. Against the grant to Lord Baltimore the planters of Virginia presented a petition, which was heard before the Privy Council in July, 1633, when it was decided that the nobleman should retain his patent and the petitioners their remedy at law. To this remedy they never thought proper to resort."
>
> Marshall's Life of Washington, Vol. 1, pp. 79, 80.

On September 18, 1649, Charles II, at *St. Germains en Ley*, granted by his letters-patent to Lord Hopton, Lord Culpeper and others, the Northern Neck of Virginia; and on May 8, 1660, Charles II, upon surrender of the first patent by the patentees, granted to the Earl of St. Albans and others the same territory.

Charles II died February 6, 1685, and was succeeded by James II, who, on September 20, 1688, confirmed unto Thomas (Lord) Culpepper, who had become the sole owner by descent and purchase of the Northern Neck, the lands formerly granted to the said Earl of St. Albans and others.

Rev. Code Va. (1819) page 343.
2 Hen. Stats. at Large, 569 to 583.
4 Ib. 514.
Record, Vol. 3, p. 1128.

> "The first grant of Charles the Second for the Northern Neck of Virginia was made when he was a monarch without a crown, a king without a subject, and a grantor without territory."
>
> McMahon's History of Maryland, p. 49.

The charter or letters-patent to Lord Baltimore dated June 20, 1632 (Vol. 1, Kilty's Laws of Maryland, Charters and Constitutions, Part I, p. 810; Abert's Laws, 636) granted the territory included within a description beginning at the promontory or headland called Watkins' Point, on the eastern shore of the Chesapeake Bay; thence east to the main ocean; thence north to the fortieth degree of north latitude; thence in a straight line by the degree aforesaid

> "unto the true meridian of the first fountain of the river of Pattowmack; thence verging towards the south unto the further bank of the said river and following the same on the west and south unto a certain place called Cinquack situate near the mouth of the said river where it disembogues into the aforesaid bay of Chessopeake; and thence by the shortest line unto the aforesaid promontory or place called Watkins' Point; . . . and all the soil, plains, woods, mountains, marshes, lakes, rivers, bays and straits situate or being within the metes, bounds and limits aforesaid."

Whatever claims may have been asserted on behalf of Virginia to the Potomac River, since the Baltimore grant, as

being within her boundaries, must of necessity be based upon the contention that the river did not become part of the territory of Maryland under said Baltimore grant; or that, if it did, it was restored to Virginia by the patents for the Northern Neck.

That the "further bank" of the Potomac River was on the Virginia shore, and that the river itself was included within the limits of the grant to Lord Baltimore, has been consistently held from the beginning by the Maryland authorities Colonial and State. The following facts may be cited in support of this statement:

In 1682 the colonial authorities of Maryland granted to Randolph Brandt, of Virginia, a patent for the island in the Potomac River, in the District of Columbia, called Analostan Island, or Mason's Island. This patent was granted upon a warrant of survey issued in 1680, and under it the island has ever since been held. (Record, Vol. 7, p. 2127.)

The Maryland convention on October 29, 1776—

> "being informed that in the constitution or form of government agreed to by the Delegates of Virginia a claim is made by them injurious to the inhabitants of this State,"

it was ordered that the same be read, and the same was read as follows, to wit:

> "The territories contained within the charters erecting the colonies of Maryland, Pennsylvania and North and South Carolina are hereby ceded, released, and forever confirmed to the people of those colonies, respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Pattowmack and Pocomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon."

And it was thereupon determined,—

> "that this convention will on tomorrow resolve itself into a committee of the whole to take the same into consideration."

The convention on the following day—

> "*Resolved unanimously*, That it is the opinion of this convention, that the State of Virginia hath not any right or title to any of the territory, bays, rivers or waters, included in the charter granted by his Majesty Charles the First, to Cecilius Calvert, Baron of Baltimore.
>
> "*Resolved unanimously*, That it is the opinion of this convention, that the sole and exclusive jurisdiction over the territory, bays, rivers and waters, included in the said charter, belongs to this State; and that the river Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said charter, *the sole and exclusive jurisdiction over the said river Potowmack*, and also over such part of the river Pocomoke as is comprehended in the said charter, belongs to this State; and that the river Potowmack and that part of the Chesapeake Bay which lies between the capes and the south boundary of this State, and so much thereof as is necessary to the navigation of the rivers Potowmack and Pocomoke, ought to be considered as a common highway, free for the people of both States, without being subject to any duty, burthens or charge, as hath been heretofore accustomed."
>
> See Proceedings of Conventions of the Province of Maryland, held at the city of Annapolis in 1774, 1775 and 1776, pp. 291, 293; and Hanson's Laws of Maryland.

In Binney's case, decided in 1829 (2 Bland, 127), the chancellor says:

> "In rivers flowing through conterminous States a common use is presumed, if there be no proof of a peculiar property excluding the universal or the com-

mon use. *Vattel, b. 1, c. 22; The Twee Gebroeders, 3 Rob. Ad. Rep. 339; Wright* vs. *Howard, 1 Cond. Chan. Rep., 95; Handly's Lessee* vs. *Anthony, 5 Wheat. 375; Landhold. Ass. 170.* But, in this instance, there is the most satisfactory evidence of an exclusive right. The boundary called for in the charter to the Lord Proprietary of Maryland is from 'the first fountain of the River Potomac, thence verging towards the south unto the further bank of the said river, and following the same on the west and south unto a certain place called Cinquack, situate near the mouth of the said river,' etc. *Chart. Maryland, Sec. 3.* To the full extent of this call for the right bank of the Potomac Maryland has always held, and under that holding all the islands in the river have been granted by patents issuing from the land office or under legislative enactments, or titles derived from this State (1822, Ch. 54); and the whole of the bed of the river above tide, it is believed, has always been admitted to be rightfully parcel of the territory of Maryland. Whether the south or the north branch should be considered as the true boundary has long been, and still is, a matter of controversy; but, before the Revolution, many patents for lands lying between the north and south branches were issued by the Lord Proprietary of Maryland. *Landhold. Ass., 173; Proce. Conven. Maryland, 30th October, 1776; Resolutions 1785, No. 1; 1795, No. 3; 1796, No. 5; 1801, No. 10; 1806, No. 10; Foster and Elam vs. Neilson, 2 Peters, 307; 3 Jefferson's Correspondence, 347; Votes and Proc. H. Del., 24th January, 1824.*"

See also, Maryland act of 1768, Ch. 5, prohibiting fish dams and other obstructions in the Potomac above the Great Falls; the Maryland act of 1784, Ch. 15, for preventing obstruction of the Eastern and Northwest Branches of the Potomac.

Chapman *vs.* Hoskins, 2 Md. Ch. p. 485.

Act of Md. 1853, Ch. 179, in relation to Washington

Aqueduct, considered in Reddall *vs.* Bryan, 14 Md. 445.
O'Neil *vs.* Md. and Va. Bridge Co., 18 Md. 1.
U. S. *vs.* Great Falls Mfg. Co., 21 Md. 120.
Biscoe *vs.* State, 68 Md. p. 296.

The jurisdiction of the United States over lands in the Potomac acquired as sites for light houses was obtained in every instance by grant from that State.

The description of the premises granted by the letters patent to Lord Culpeper, dated September 20, 1688, in which the rights granted in previous letters-patent for the Northern Neck were merged and confirmed, is as follows: (Record, Vol. 3, p. 1128; Rev. Code Va., 1814, p. 8; Rev. Code 1819, p. 343, and subsequent codes.)—

> "All that entire tract, territory or parcel of land situate, lying and being in Virginia in America, and bounded by and within the first heads or springs of the rivers Tappahannock *als* Rappahannock and Quiriough *als* Patawomeck rivers, the courses of the said rivers from their said first heads or springs, as they are commonly called and known by the inhabitants, and descriptions of those parts and the Bay of Chesaypeyock, *together with the said rivers themselves and all the islands within the outermost banks thereof and the soile of all and singular the premises.*"

It nowhere appears that the State of Virginia, acting through its executive, legislative or judicial departments, has ever solemnly and unequivocally claimed the Potomac River to be within her territorial limits, except in so far as it may be implied from the action of her convention of 1776 in relinquishing to Maryland, Pennsylvania and North and South Carolina the territories included within the limits of their charters.

In fact, beginning with such relinquishment, there are many official acts of the State which recognize the rightful character of Maryland's claims in the premises.

First may be mentioned the significant act of the Legislature of Virginia relating to the limits of the Northern Neck, passed in 1748, in which it is recited that—

> "in the late dispute and controversy touching the limits and boundaries of the several letters patent granted by their late Majesties, King Charles the Second, and King James the Second, unto the ancestors of the Right Honorable Thomas Lord Fairfax, *it hath been adjudged and determined*, by his present majesty in council, that the said letters patent do include *all that tract or territory of land between the rivers Potowmack and Rappahannock, and the line now marked from the head spring of the said river Potowmack, to the head spring of Rappahannock.*"

Notwithstanding the grants for the Northern Neck included "the rivers themselves," that is, the Potomac and Rappahannock and their soils, and that Fairfax's title to the lands within said grants was not affected by the events of the Revolution (Hunter's Devisee *vs.* Fairfax's Lessee, 7 Cranch, 602), the Court of Appeals of Virginia in 1798, held, in Home *vs.* Richards, 4 Call, 441, that title to the bed of the Rappahannock, a navigable river, was in the commonwealth.

This amounted to a judicial declaration that the *jus privatum* of the bed of neither river was in Fairfax under said grants.

The terminus on the bay of the line along the bank of the Potomac in the Baltimore patent is the place called "Cinquack," which upon the map of Captain John Smith, printed with his General History of Virginia several years before the Baltimore grant, is located at or near the present "Smith's Point;" and that Cinquack and Smith's Point are indentical localities is conceded by the act of Virginia passed January 3, 1786 (1st Rev. Code Va. 1819, p. 53), ratifying

the compact entered into between the commissioners of that State and those of Maryland "to regulate and settle the jurisdiction and navigation of Potowmack," etc., by the tenth paragraph of which it was provided that—

> "all piracies, crimes, or offences committed on that part of Chesapeake Bay which lies within the limits of Virginia, *or that part of the said bay where the line of division from the south point of Potowmack River (now called Smith's Point) to Watkins' Point* near the mouth of Pocomoke River may be doubtful, and in that part of Pocomoke River within the limits of Virginia, or where the line of division between the two States upon said river is doubtful, by any persons not citizens of the Commonwealth of Virginia against the citizens of Maryland, shall be tried in the courts of the State of Maryland, which hath legal cognizance of such offences," etc.

Of this provision of the compact, the commissioners appointed by Maryland in one of the abortive efforts made by the two States to come to an agreement as to the boundary between them, say—

> "It is remarkable that in the compact of 1785 provision is made for punishing offenses committed on that part of Pocomoke River within the limits of Virginia, or where the line of division between the two States *upon the said river is doubtful*, but no such provision is made in regard to the Potomac, a much wider river. The reason must have been that Virginia had excepted from the limits of the Maryland Charter on the Potomac River only 'the Virginia shore or strand,' which could only extend to low water mark, and to such improvements beyond that mark as Virginia might deem proper to authorize, leaving the residue of the river within Maryland jurisdiction for punishing offenses committed upon it."

Statement on the part of Jones, Waters, and Aydelott, Commissioners of Maryland, p. 57 *et seq.*, of

"Report and Accompanying Documents of the Virginia Commissioners, appointed to ascertain the boundary line between Maryland and Virginia. Richmond, 1873."

It is to be observed that the premises granted by the Northern Neck patents are expressly stated to be "in Virginia in America." The prior grant to Lord Baltimore is nowhere mentioned in them, and it is evident, upon the face of the Northern Neck grants, that the king in executing them acted under the mistaken impression that the Potomac River was then within the territorial limits of that colony.

It is not permissible under these circumstances to suppose, much less to find, that the king meant to interfere with the rights of Lord Baltimore, for wrongful act or even intent can not, by the common law, be imputed to him.

Blackstone, 2d Com. 348, lays down the rule applicable to such a case as follows:

> "But the king's grant shall not enure to any other intent than that which is precisely expressed in the grant . . . when it appears, upon the face of the grant, that the king is mistaken or deceived, either in matter of fact or matter of law, as in the case of false suggestion, misrepresentation, or misrecital of former grants; or if his own title to the thing be different from what he supposes; or if the grant be informal, or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void."

However, be the real merits what they may, from a legal standpoint, of the ancient controversy between Maryland and Virginia as to the line of their boundary on the Potomac river, that controversy has been finally disposed of by a reference of the matter to a board of arbitrators consisting of Hons. J. S. Black, of Pennsylvania, J. B. Beck, of Kentucky, and C. A. Jenkins, of Georgia, whose award, made in 1877, was in favor of Maryland, but limited her to low

water mark on the Virginia shore by reason of the compact of 1785.

The various acts of the legislatures of the two States providing for the arbitration, and accepting the resulting award, together with the act of Congress consenting thereto as to the part of the river in the District of Columbia, are printed for convenient reference by the court in Appendix A to this branch of the Government's brief (page 65).

The award will be found at page 2124, Vol. 7, of the Record.

The right of the States to establish and fix disputed boundaries between their respective territories, is beyond question, and the boundaries so fixed and established become—

> "conclusive upon all the subjects and citizens thereof and bind their rights, and are to be treated to all intents and purposes as the true and real boundary."
>
> Poole *vs.* Fleger, 11 Pet. 209.
> Marlot *vs.* Silks, 11 Pet. 1.
> Garcia *vs.* Lee, 12 Pet. 521.
> Pollard's Heirs *vs.* Kibbe, 14 Pet. 409.
> Henderson *vs.* Poindexter, 12 Wheat. 535.
> Delacroix *vs.* Chamberlain, 12 Wheat. 600.
> Indiana *vs.* Kentucky, 136 U. S. 487.
> Virginia *vs.* Tennessee, 148 U. S. 517–523.
> Wharton *vs.* Wise, 153 U. S. 166.

Thus by the convention of the two States and the concurrence of the United States all pretensions to public or private property rights, as well as to political jurisdiction in and over the main body of the Potomac River, including that part of it within the District of Columbia, have been effectually settled in favor of those claiming under the Maryland patent.

It follows that the claim made by all of said defendants under the deed from Denny Martin Fairfax to James (M.) Marshall is without foundation.

II.

The second proposition of the defendants, heirs of James (M.) Marshall, was:

> *That, if title to the said bed and shores of the Potomac River did not pass by the Northern Neck grants, but became vested in Lord Baltimore, under the grant to him for the Province of Maryland, then, and notwithstanding the Revolution and the confiscation acts of the State of Maryland enacted during the war, Frederick Henry Harford succeeded to the same, and the same is now vested in said defendants under the deed from said Harford to them of June 9, 1888.*

This proposition is clearly untenable under the decisions of this court, being primarily based upon the erroneous assumption that by the grant to Lord Baltimore the king intended "to sever the bottoms of the navigable waters from the prerogative powers of government" conferred by the charter, and—

> "to convert them into mere franchises in the hands of a subject, to be held and used as his private property."

Mr. Justice Gray, in Shively *vs.* Bowlby, 152 U. S. 1, in a comprehensive review of the authorities upon the subject of public and private rights in lands below high water-mark of navigable waters, states that Martin *vs.* Waddell, 16 Pet. 367, is "the leading case in this country as to the title and dominion of tide waters and of the lands under them."

The precise point involved in the case of Martin *vs.* Waddell is involved in this; there it depended upon "the construction and legal effect of the letters patent to the Duke of York;" here it depends upon the construction and legal effect of the letters patent to Lord Baltimore, and the reasoning upon which was based the opinion of the court in that

case, holding that there was no such severance, is equally applicable to this.

The letters patent to the Duke of York and those to Lord Baltimore alike confer upon the grantee private property rights in and governmental powers over the territories which were the subject of the respective grants. The grants contain like provisions in regard to laws to be enacted under them. In that to the Duke of York the requirement was that they should—

> "not be contrary to, but as nearly as might be agreeable to the laws, statutes, and government of the realm of England."

In that to Lord Baltimore it was that they should—

> "be consonant to reason and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the laws, statutes, customs, and rights of our Kingdom of England."

The object of the king in making the grant to Lord Baltimore was not wholly to benefit that nobleman. By the first section of the patent it sufficiently appears that the grant was made for the purpose of extending the king's empire, and that "the certain privileges and jurisdictions" conferred were intended for the "wholesome government and state of the colony."

Upon a critical review of this charter the court below reached the obviously just conclusion that the Maryland grant is "the most ample and sovereign in its character that ever emanated from the English crown," and that—

> "this true and absolute lord and proprietary, 'saving always the faith and allegiance and sovereign dominion due to the king,' had become endowed by the most certain, pacific, and favorable form of tenure of an *imperium in imperio*."

Nevertheless, notwithstanding the liberality of the grant of private property rights in the Province and of govern-

mental rights over it, nothing appears in the charter (any more than appears in that of the Duke of York) to clearly establish any intent upon the part of the king to sever the *jus privatum* of the beds and shores of its tidewaters from the *jura regalia* and to convert the *jus publicum* into a mere easement.

The provisions of the second section of the charter are confined to a mere description of the boundaries and limits of "all that tract of land" granted; its principal features otherwise, are as follows:

SECTION IV.

"Also we do grant, and likewise confirm, unto the said Baron of Baltimore, his heirs and assigns, all islands and islets within the limits aforesaid, all and singular the islands and islets from the eastern shore of the aforesaid region towards the east, which have been or shall be formed into the sea, situate within ten marine leagues from the said shore; with all and singular the ports, harbors, bays, rivers and straits belonging to the region or islands aforesaid, and all the soil, plains, woods, mountains, marshes, lakes, rivers, bays and straits situate or being within the metes, bounds and limits aforesaid, with the fishings of every kind of fish, as well of whales, sturgeons and other royal fish, as of other fish, in the sea, bays, straits or rivers within the premises, and the fish there taken; and moreover, all veins, mines and quarries, as well opened as hidden, already found or that shall be found within the region, islands or limits aforesaid, of gold, silver, gems and precious stones, and any other whatsoever, whether they be of stones or metals or of any other thing or matter whatsoever; And, furthermore, the patronages and advowsons of all churches which (with the increasing worship and religion of Christ) within the said region, islands, islets and limits aforesaid, hereafter shall happen to be built, together with license and faculty of erecting and founding churches, chapels, and places of worship, in

convenient and suitable places, within the premises, and of causing the same to be dedicated and consecrated according to the ecclesiastical laws of our Kingdom of England, *with all and singular such, and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights, and temporal franchises whatsoever, as well by sea as by land, within the region, islands, islets and limits aforesaid, to be had, exercised, used and enjoyed, as any bishop of Durham, within the bishoprick or county palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used or enjoyed, or of right could or ought to have, hold, use or enjoy.*"

Blackstone, 3 Comm. 77, speaking of Counties Palatine, says that "originally all *jura regalia* were granted to the lords of these counties." The palatinate jurisdictions are discussed in Russel *vs.* Baker, 1 H. & J. 72; Cokes Inst. 4 Part, Ch. 36, p. 204; Bishop of Durham's Case, Dyer, p. 288; 6 Vin. Abridg. 573 to 583; 2 Bacon Abridg. 188 to 192.

By the fifth section the grantee and his heirs are constituted—

"the true and absolute lords and proprietaries of the region aforesaid and of all other the premises (except the before excepted) *saving always the faith and allegiance and sovereign dominion*, due to us, our heirs and successors"—

and by the sixth section the region granted is erected into a province under the name of Maryland "as out of the plenitude" of the "royal power and prerogative" of the king.

In the remaining portions of the charter, extensive, powers civil and military, and certain privileges and rights are specifically conferred upon the proprietors and the people, "by the terms of these presents" and "for the good and happy government of said province" as declared in section seven.

Free, full and absolute power is given by section 7—

> "to ordain and enact laws of what kind soever . . . relating to the public state of the said province or the private utility of individuals of and with the advice, assent, and approbation of the free-men of the same province . . . or their delegates or deputies whom we will shall be called together for the framing of laws;"

which laws are to be duly executed—

> "upon all persons for the time being within said province . . . by the imposition of fines, imprisonment and other punishment whatsoever;"

and "to constitute and ordain judges, justices, magistrates, and officers" with such powers as to Lord Baltimore or his heirs shall seem most fitting; power is also given to him and them—

> "to remit, release, pardon and abolish all crimes and offences whatsoever against such laws whether before or after judgment passed, and to do all and singular other things belonging to the completion of justice,"

which said laws are to be kept "by all the subjects and liegemen" of the king, his heirs and successors, in said province;

> "*So, nevertheless, that the laws aforesaid be consonant to reason and be not repugnant or contrary but (so far as conveniently may be) agreeable to the laws, statutes, customs, and rights of this our Kingdom of England.*"

By the eighth section, "for the better government of so great a province," the grantee and his heirs are authorized to—

> "make and constitute fit and wholesome ordinances from time to time where such are rendered necessary before the freeholders of the province, their delegates or deputies, can be called together."

And in order "that the new colony may more happily increase by a multitude of people resorting thither," power, license, and liberty is given by section 9—

> "to all the liegemen and subjects present and future of the king to transport themselves and their families to the said province,"

and at the appointment of Lord Baltimore and his heirs "to build and fortify castles, forts, and other places of strength" for "the public and their own defense."

By the tenth section the king charges and commands that the said province be of his "allegiance" and that all his subjects and liegemen transplanted thereto, and their descendants to be born there, "be and shall be natives" of the kingdom and shall be treated, reputed and esteemed as the "liegemen" of the king born within the kingdom of England, etc.

By the eleventh section license to ship and lade in any of the king's ports, wares, merchandises, etc., and to transport the same to the said province, is given to the Proprietary, his heirs and all other persons who shall from time to time repair to the province.

By the twelfth section, "as full and unrestrained power as any Captain-General of an Army ever hath had" is given to Lord Baltimore and his heirs and assigns—

> "to summon to their standards and to array all men . . . for the time being in the said Province of Maryland, to wage war and to pursue even beyond the limits of their province"—

enemies infesting the same, etc.; and "in case of rebellion, sudden tumult or sedition," power is given by the thirteenth section to him, and his heirs and assigns, to—

> "exercise martial law as freely and in as ample manner and form as any Captain-General of an Army by virtue of his office may," etc.

By the fourteenth section power is given to him and to his heirs and assigns—

> "to confer favors, rewards and honors upon such subjects inhabiting within the province aforesaid as shall be well deserving, and to adorn them with whatsoever titles and dignities they shall appoint,"

not being the same as are now used in England, etc.

Section fifteen confers certain trading privileges and liberties upon him, his heirs and assigns, and the inhabitants of the province.

By the sixteenth section there is granted to him, his heirs and assigns,—

> "full and absolute power and authority to make, erect and constitute within the Province of Maryland . . . such and so many seaports, harbours, creeks, and other places of unlading and discharge of goods and merchandises out of ships, boats and other vessels, and of lading in the same, and in so many and such places and with such rights, jurisdictions, liberties, and privileges unto such ports respecting as to him or them shall seem most expedient," etc.

By the seventeenth section Lord Baltimore and his heirs and assigns are to have and enjoy the taxes and subsidies on goods to be laden or unladen within the ports, etc., aforesaid.

By the eighteenth section there is given to him, his heirs and assigns, "full and absolute license, power and authority" to—

> "assign, alien, grant, demise or enfeoff so many, such and proportionate parts and parcels of the premises to any person or persons willing to purchase the same, as they shall think convenient,"—

to be held of the aforesaid Lord Baltimore, his heirs or assigns, by such "services, customs and rents" as the said Lord Baltimore, his heirs and assigns, shall deem fit and not immediately of the King, his heirs and successors.

By the nineteenth section authority is given to him and to his heirs "to erect any parcels of land within the province aforesaid into manors," etc.

The twentieth section declares that the king will not thereafter impose customs or other taxations upon the goods, lands and tenements within the province, etc.

By the twenty-first section it is declared that—

> "the freeholders or inhabitants of the province . . . shall not henceforth be held or reputed a member or part of the land of Virginia,"

from which both the province and its inhabitants are thereby separated and made distinct and "immediately subject to our crown of England and dependent on the same forever."

The twenty-second section charges and commands that if any doubt or question arise concerning the true meaning of any word, clause, or sentence contained in the charter, that interpretation shall be applied always in the king's courts and judicatories—

> "which shall be judged to be the more beneficial, profitable and favorable to Lord Baltimore, his heirs and assigns," etc.

In view of these provisions there is, as to the point in dispute, absolutely no ground for distinguishing the grant to Lord Baltimore from that to the Duke of York, and the decision in Martin *vs.* Waddell is conclusive.

Chief Justice Taney, who delivered the opinion in that case, was at the time of his appointment to the bench of this court, one of the foremost lawyers at the bar of Maryland, his native State, and he was, therefore, thoroughly familiar with the provisions of the charter of Lord Baltimore; indeed, it is evident that he had in mind this charter among others, when he said (p. 414):

> "This opinion is confirmed by referring to similar grants of other tracts of country upon this continent, made about the same period of time. Various other charters for large territories on the Atlantic Coast

were granted by different monarchs of the Stuart dynasty to different persons for the purposes of settlement and colonization, in which the powers of government were united with the grant of territory. Some of these charters very nearly resembled in every respect the one now in controversy, and ~~some~~ none of them, it is believed, differed materially from it in the terms in which the bays, rivers, and arms of the sea and the soils under them were conveyed to the grantees."

Elsewhere in the opinion he cites Johnson *vs.* McIntosh, 8 Wh. 595, and states the doctrine upon the subject to be (p. 409) that:

> "The country mentioned in the letters patent was held by the king in his public and regal character as the representative of the nation and in trust for them. The discoveries made by persons acting under the authority of the government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent."

On page 411 of the opinion he states the question in the case, which is identical with that arising here, as being—

> "*whether the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers of the duke? Whether in his hands they were intended to be a trust for the common use of the new community about to be established, or private property to be parceled out and sold to individuals for his own benefit.*"

He then says that in deciding a question like this—

> "We must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the contemporaneous construction given to it and the usages under it for the century and more which has since elapsed,

are all entitled to consideration and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community, and in that light it should be regarded and construed. . . . They (the letters-patent) were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England, and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain accustomed to be governed according to its usages and laws."

Again he says (p. 413):

"The estate and rights of the king passed to the duke in the same condition in which they had been held by the crown and upon the same trusts. Whatever was held by the king as a prerogative right passed to the duke in the same character. And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters patent with 'other royalties,' and conveyed as such. No words are used for the purpose of separating them from the *jura regalia* and converting them into private property to be held and enjoyed by the duke apart from and independent of the political character with which he was clothed by the same instrument. Upon a different construction it would have been impossible for him to have complied with the conditions of the grant, for it was expressly enjoined upon him, as a duty in the government he was about to establish, to make it as near as might be agreeable, in their new circumstances, to the laws and statutes of England; and how could

> this be done if in the charter itself this high prerogative trust was severed from the regal authority; if the shores and rivers and bays and arms of the sea and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property to be parceled out and sold by the duke for his own individual emolument? There is nothing, we think, in the terms of the letters-patent or in the purposes for which it was granted that would justify this construction. And in the judgment of the court the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England and the soils under them are held by the crown."

As a conclusion from this reasoning, the court held (p. 410), that—

> "when the revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

And (p. 416):

> "When the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and royalties which before belonged to the crown or the parliament became immediately and rightfully vested in the State."

The circumstances in the case at bar being so entirely similar in their nature to those upon which the reasoning of the chief justice in the case of Martin *vs.* Waddell, was based, the views there expressed and conclusions there

reached by the court, whose mouthpiece he was, are equally applicable. Under the principles of this decision, the beds and shores of the tidewaters in Maryland passed to Lord Baltimore "as one of the royalties incident to the powers of government;" and conceding that he had the power to sever them from such royalties, he never did so as to the *locus in quo*; they remained intact to the time of the Revolution, and then their ownership devolved upon the State as the sovereign; they remained intact in the State until they passed to the present sovereign, the United States, under the act of cession of 1791.

As indicating the "contemporaneous construction" which is considered in Martin *vs.* Waddell as entitled to weight, it can not be gainsaid, for the colonial records show the fact to be that Lord Baltimore and his successors in title as proprietaries recognized the distinction between the private property right and the trust ownership for the public and administered the land affairs of the colony in accordance with the above principles.

It appears from the history of the administration of his land affairs that the proprietary never executed a patent which upon its face and in terms granted the bed or shores of any tidewater in the province, or that he ever claimed the right to do so, or ever regarded the disposition of such beds and shores as other than a public matter which was under the control of the legislature and to be accomplished only through the action of that body, or as requiring their joint action as the law-making power representing the public; and under the State government it was not supposed prior to the decision in Brown *vs.* Kennedy, in 1821, that there existed under the law any authority in the land office to entertain applications and to issue patents for such lands.

Illustrations of legislative disposition, or of disposition by the joint act of the proprietary and the legislature, will be found in the act of 1699, entitled, "An act for ascertaining the boundaries of lands," which is printed in full in the

Appendix to Kilty's Landholder's Assistant, at p. ix; and in the tenth section of the Act of 1745, Ch. 9, section 6 of the act 1784, Ch. 39, and other acts having a local application only to towns established by them.

The Act of 1699 provides:

> "If any man hold land by a river or creek side, yet so as there lies marsh betwixt the firm land and the river, such adjacent marsh shall not be taken up, or, being already taken up by any other, shall not be held, but such adjacent marsh shall be deemed and adjudged to belong to the land to which it is adjacent, and be bound by the same courses drawn from the firm land into such river or creek as the firm land is bounded by, except in Somerset County and upon Delaware and the ocean."

On page 13 Kilty quotes the note to this Act in Bacon's Edition of the Maryland Laws, which states that it fell under a general repeal of 1704, was revived later in that year for a brief period, that it was in like manner revived in 1705 and 1706, and that it totally expired in 1707.

Section ten of the act of 1745, Ch. 9, and section six of the act of 1784, Ch. 39, giving owners of lots in Baltimore bordering on the water the right to improve in front of their lots, are laws peculiar to that city, passed to foster its commercial growth. Neither the colonial legislature nor the legislature of the State prior to the act of cession passed any general law providing for the disposition of this kind of property; unless the act of 1781, Ch. 20, and the act of 1788, Ch. 44, relating to the sale of the "vacant lands" of the State, which, with the decision in Brown *vs.* Kennedy, 5 H. & J. 195, will be more fully considered hereafter in connection with the Kidwell claim, are to be considered as such laws.

The method of procedure in obtaining title to land in Maryland under the proprietary is stated by Judge Cox in determining the question of the ownership of a supposed

gold mine in one of the tracts taken for the Rock Creek Park. In delivering the opinion of the court he says:

> "In an exposition by Kilty of 'original titles as derived from the Proprietary government, and more recently from the State of Maryland,' called the Landholder's Assistant, and which has been referred to by counsel on both sides in the argument as a work of authority, it appears that the Proprietary formulated from time to time rules and regulations for the disposition of the land, called 'conditions of plantations, instructions, etc.' These 'conditions of plantations, instructions, etc.,' became matter of record, and, so far as extant among the public records of the State in the year 1808, are printed in the work referred to, which was issued in that year, and were originally carried into effect by some one or other of his lordship's agents and chief officers in the province, such as his 'lieutenant general,' his 'chief governor,' his 'lieutenant governor,' and later by the governor and council, and others charged with the management of land affairs.
>
> "Three steps were necessary for transferring the title from the Proprietary to the individual seeking the patent. The first was a warrant issued by the proper officer and which was the authority to the surveyor of the county to survey and lay off the particular quantity of land. The next step was the returning by the surveyor of his certificate of survey; and the third step was the issue of the patent. In the course of time another form of warrant came to be issued, called the warrant of resurvey. Parties having several contiguous tracts by patent from the land office procured from it a warrant of resurvey authorizing the surveyor to resurvey those tracts, the grounds assigned for which were the uncertainty of existing bounds and the desire of the parties to connect several adjoining tracts in one survey. At first the privilege of taking in contiguous vacancy, over and above the quantities originally granted, did not attach to this kind of warrants, but this subsequently became the main object of these resurveys," etc.

On appeal the whole opinion was considered to be "so elaborate and careful" a discussion of the subject that it was adopted by this court "as presenting a full and satisfactory treatment of the question."

Shoemaker *vs.* United States, 147 U. S., 307, 308.

Reference to Kilty shows that the system established by the Proprietary or under his authority, for disposing of his lands under the charter, did not contemplate any invasion of the *jura regalia* by grants of the beds and shores of tidal waters, but, on the contrary, carefully avoided it. No patent within the metes and bounds of which land of that character was included was ever *knowingly* issued by him or under his authority by his land office or agents, although some were issued which while upon their face showing simply a grant of land in the ordinary sense did in fact, upon running the lines, extend into the tidewaters and include portions of their beds and shores. Such were in derogation of his instructions and plain intent.

One of certain instructions to the surveyors issued by his authority on December 5, 1768, was couched in the following terms, viz:

> "17. In resurveying old tracts whereof part may be found *to lie in the water*, you are to be careful in certifying whether it is likely to have been washed away *or to have been* an error in the *original survey*."

Kilty's Landholder's Assistant, p. 289.

And this was the rule afterwards under the State government, as is shown by the—

> "Rules and Orders for the direction of Surveyors in their office established by the Governor and Council, the 15th day of April, 1782,"

the 16th of which Rules and Orders is couched in precisely the same terms.

Ibid., 439.

It seems further to have been the policy of the Proprietary to secure to the greatest number the benefits of access to the water, for by his instruction of November 12, 1656, he directed that there be surveyed and assigned to his lordship's brother, Philip Calvert, six thousand acres, provided—

> "that there be not above fifty poles of land laid out upon any *water side* of every fifty acres to be assigned as aforesaid and so proportionately for any greater quantity of land,"

which proportion it is further declared—

> "his lordship wills and requires his said lieutenant and council to cause to be observed in surveying and setting forth all other lands claimed by any person or persons by virtue of any of his lordship's conditions of plantations, or any other warrant or order heretofore or which hereafter may be obtained from his lordship notwithstanding that particular mention be not made thereof in any such warrant or order.'

Ibid., pp. 54, 55.

We have an illustration of the application of the above-mentioned instruction 17 in the present case, in the certificate of survey of Cerne Abbey Manor, dated in 1769, and being a resurvey on the older grants of Duddington Manor, Duddington Pasture, and New Troy. The surveyor excluded from the resurvey two parcels of land—one containing 40 acres and the other 75 acres—which were included in the originals, for the reason that said parcels were respectively in the navigable waters of the Eastern Branch and of Goose (Tiber) Creek, and patent issued accordingly.

Record, Vol. 6, pp. 385–8 and plat.

Other illustrations will be found in the surveyor's certificate of resurvey for William Rogers of Boreing's Convenience and Bold Venture, dated June 30, 1759, wherein he certifies that both tracts contain 173¼ acres, "one hundred and fifty-two acres and the fourth part of an acre, part

whereof lieth in elder surveys and navigable water," which 152¼ acres he therefore excludes, and the residue with vacant land added is returned for 53 acres, and patented accordingly (Wilson et al. *vs.* Inloes et al., 6 Gill., pp. 135–140), and in the certificate of survey for Edward Fell of Fell's Prospect, dated May 20, 1761, being a resurvey on Long Island Point and other border grants, amounting on the whole to 303 acres, of which 33 acres the surveyor states "is taken away by elder surveys and lost in navigable water, which I have excluded."

Casey *vs.* Inloes, 1 Gill. 461–2.

Proprietary *vs.* Jennings, 1 H. & McH. pp. 64–5, which was an information filed by his lordship's attorney general in 1733, to vacate a patent on the ground that it had been illegally obtained, clearly indicates that in the view of the Proprietary land under tidewater was not patentable.

The information filed in the case, "for and on behalf his lordship," avers, among other things, that a certain Todd, either conscious that if he had any warrant or other authority to justify and support a survey had divested himself thereof by an assignment to one Acton,—

> "or well knowing that the courses expressed in the said survey would run into the Severn River and were really so irregular and uncertain that they would include little or no land, never proceeded to take further steps to take his lordship's grant or patent," etc.

In Smith and Purviances *vs.* State, 2 H. & McH., 247, which was an appeal from a decree of the chancellor, dated April 27, 1786, vacating and annulling, on the ground of fraud and misrepresentation, a patent granted to Nathaniel Smith, June 2, 1783, for a tract of land called Bond's Marsh Resurveyed, the decree was affirmed. It appears from the case that Smith was the owner of a tract of land called Bond's Marsh which had been granted to a certain John Bond, September 16, 1766, for four acres, and that on April 29, 1782, Smith, who was then the owner of the tract,

petitioned for a warrant of resurvey on it, stating that he had discovered some vacant land contiguous thereto, and that he was desirous of adding the same thereto, whereupon the surveyor of the county—

> "was directed to lay out and carefully resurvey, for and in the name of him, the said Smith, the said tract of land called Bond's Marsh, according to its ancient metes and bounds . . . adding any vacant lands thereto contiguous," etc.;

that on May 8, 1782, the surveyor certified to the land office that he had re-surveyed the said original tract called Bond's Marsh, and that it contained exactly four acres, and that there was the quantity of seventeen and a half acres of vacant land added, and that said Smith obtained from the State a grant on the said certificate for twenty-one and a half acres under the name of Bond's Marsh Resurveyed; that said Smith, on July 8, 1784, conveyed for a consideration two undivided third parts of said tract to Samuel and Robert Purviance and—

> "that although the said Smith by his aforesaid petition did allege and set forth that he had discovered vacant land adjoining the said tract called Bond's Marsh, there was not any vacant land adjoining or contiguous to the same, but that the whole which, by the said grant, is granted to the said Smith as vacant land added to the original tract aforesaid now is and at the time of obtaining the said warrant and grant was *part of the waters of the northwest branch of Patapsco River.*"

And the bill avered that the Purviances were not innocent purchasers, but knew that the pretended vacancy included in the patent "*was not land but part of the waters of the northwest branch of Patapsco River,*" etc.

In the foot notes to Baltimore *vs.* McKim, 3 Bland, 468–9, the cases of Fowler *vs.* Goodwin and Ritchie *vs.* Sample, decided in the land office, are noted. In Fowler *vs.* Goodwin, Kilty, Chancellor, on May 19, 1809, refused to direct a patent

to issue because a large part of the land lay in the waters of Bell's Cove; and in Ritchie *vs.* Sample, the certificate of survey showed that the tract applied for was a parcel of the Susquehanna River comprehending a number of small islands; and the chancellor held, July 10, 1826, that—

> "the land covered by the water can not be called grantable land, although possibly islands may have been taken up together, between which the water sometimes flows."

In the case of Baltimore *vs.* McKim, decided in 1831, the chancellor says (p. 468) that—

> "from the proceedings in the land office an opinion seems to have been entertained by those who might have been presumed to have been sufficiently well informed of the law of the office that here, as in Virginia, (Mead *vs.* Haynes, 3 Rand, p. 36) a patent gave title at most no further than to low water-mark; (2 Hen. Virg. State, 456; 1 Hazard's State Papers, 488;) and that no land covered by any navigable tidewater could be made the subject of a patent from the land office of Maryland. (Land Ho. Ass't., 148; Lord Proprietary *vs.* Jennings, 1 H. & McH., 95; Smith *vs.* The State, 2 H. & McH., 251.)
>
> "Upon a more careful consideration of the whole subject, however, it has been *finally* settled *that the bed of any of the navigable waters of the State may be granted, and will pass if distinctly comprehended by the terms of an ordinary patent, issuing from the land office, subject only to the existing public uses of navigation, fishery, etc.; which can not be hindered or impaired by the patentee.* (Brown *vs.* Kennedy, 5 H. & J., 195.)"

In the court below Brown *vs.* Kennedy was relied on (in opposition to the doctrine announced in Martin *vs.* Waddell) as a Maryland decision supporting the position that the grant from the king to Lord Baltimore severed the ownership of the beds and shores of tide waters in the colony from the *jura regalia*, and that he took title to them in the same manner as to the upland, but subject to the *jus publicum*;

the further argument being that such beds and shores remained the purely private property of the Proprietary until the Revolutionary War; and that it was protected from the effect of the confiscation acts of the State, passed during that struggle, by the treaty of peace, and by the Act of Maryland of 1787, Ch. 25.

With the adoption of the Declaration of Rights and the Constitution of the State, the political powers of the Proprietaries of Maryland under the charter ceased; on the 5th of February, 1777, the first General Assembly of the newly declared sovereign and independent State met at Annapolis. The dominion of Henry Harford, who succeeded Frederick, Lord Baltimore, as Proprietary of the Province, extended from the year 1773 until the above meeting in 1777 of the General Assembly of the State.

At the October session, 1780, of the General Assembly, an act was passed (Ch. 45) the preamble to which recited that Great Britain had commenced an unjust war against the United States, had confiscated the property of the citizens of these States, etc., and that the subjects of Great Britain possessed considerable landed and other property in this State, and that by the law of nations the subjects of Great Britain, in their separate and collective capacity, were answerable for the expenses incurred by the State in the war, and that their property, wherever found, was subject to seizure and confiscation. It is then declared—

> "That all property within the State, debts only excepted, belonging to British subjects, shall be seized and is hereby confiscated to the use of the State."

By another act of the same session (Ch. 49) certain persons were appointed commissioners for the purpose of preserving all British property confiscated by the above act, and the commissioners so appointed were declared—

> "to be in the full and actual seisin and possession of all British property seized and confiscated by the said act, *without any office found, entry, or other act to be done,*" etc.

Henry Harford was expressly declared to be a British subject by the act of November session, 1780, Ch. 51, entitled—

> "An act to procure a loan, and for the sale of Escheat lands and the confiscated British property therein mentioned."

The preamble recited the necessity of procuring a sum of specie for the immediate relief of such of the quota of the State in the Continental service as are prisoners of war with the enemy, and for clothing for the recruits to be raised in the State, etc., and then provided for the issue of certificates, to make certain the true and speedy payment of which it was provided by section 4:

> "That the following property within this State of persons well known to this General Assembly to be British subjects, within the description and intent of the act of this present session to seize, confiscate and appropriate all British property within this State, that is to say, the several manors within the counties of St. Mary's, Kent, Charles, Queen Anne's, Dorchester, Somerset, and Worcester, *which belonged to the late Lord Proprietary* . . . shall be and are hereby pledged and set apart as security therefor.

Henry Harford, whose title as the successor of Frederick, Lord Baltimore, as Proprietary of Maryland was recognized by the Assembly, did not repair to the province after the death of Frederick, but remained in England; and when, at the close of the war, the 23 Geo. III., Ch. 80, was passed, appointing commissioners to inquire into the losses of such persons as had suffered in their rights and properties by reason of attachment to the British Government, he appeared before it as a "Loyal British Proprietor," claiming on account of loss of lands and revenues a large sum; he

received in settlement the sum of £90,000 from the British Treasury. In 1785 he memorialized the Legislature of Maryland for compensation or restoration of his confiscated property, and was heard by counsel at the bar of the House, and his memorial was acted upon adversely. (Rec., Vol. 7, p. 2123.)

In 1803 these acts were enforced by the State, and a sale made by it of the property of a British subject; the title of the State's grantee was upheld by this court, notwithstanding the treaty of peace.

Smith *vs.* The State, 6 Cr., 286.
See, also, Owings *vs.* Norwood's Lessee, 5 Cr., 344.

The Virginia act of confiscation, under which the State took possession of the lands belonging to Fairfax after the Culpeper patent for the Northern Neck, did not operate *proprio vigore* to divest title, but, as held by this court, to render that act effective required judicial proceedings.

Fairfax's Devisee *vs.* Hunter's Lessee, 7 Cr., 603.

In this respect the legislation of the two States was radically different. The Maryland act effected the confiscation "*without* any office found, entry, or other act to be done;" the Virginia act did not.

After the Revolution, therefore, the State of Maryland held under the confiscation acts the property which had belonged to Henry Harford under the charter, and it held title to the beds and shores of the Potomac River and other tidal waters within its borders by virtue of its succession as sovereign to the *jura regalia* of the crown; and even if the beds and shores of such tidal waters be treated as the private property of the proprietary under the charter, then such title passed to the State by virtue of said confiscation acts. So that, in any view, the State became invested with the title to them which was originally invested in the crown.

It only remains to be considered what effect, if any, the treaties of peace had upon the State's title, upon the theory that it was derived under the confiscation acts; for, obviously, if they passed to the State as part of the prerogative rights of the former sovereign, the title could not possibly be affected by said treaties.

It is claimed in the answer of the heirs of James (M.) Marshall (see p. 17 of this Brief), that by the fifth article of the preliminary treaty of peace of 1783—

> "It was agreed that Congress should earnestly recommend to the legislatures of the respective States to provide for the restitution of all the estates, rights and property which had been confiscated belonging to real British subjects, and in the sixth article of said preliminary treaty it was provided that there should be no future confiscation of British property"—

and that though these provisions were also made in the fifth and sixth articles of the definitive treaty of peace of 1784, and though the ninth article of the treaty of amity and commerce of 1796, provided that British subjects might grant, sell and devise lands held by them to whomsoever they pleased and—

> "that neither they nor their assigns should, so far as respects said lands and the legal remedies incident thereto, be regarded as aliens,"

said respondents say that Congress never did at any time—

> "recommend to the Legislature of the State of Maryland the restitution of the property aforesaid, and that after said treaties of peace, preliminary and definitive, the United States obtained from the State of Maryland the cession of the District of Columbia in 1791, under and by virtue of which cession they now claim title to the property in controversy, and that the same was and is the very property which the United States by its solemn treaty of peace had pledged itself to recommend to the State of Maryland to be restored, and which these respondents are informed it never did so recommend."

It is evident that the point here sought to be made presents a political rather than a judicial question; as such it was urged against the United States by the British Minister, as shown by the record, in certain correspondence with Mr. Jefferson, Secretary of State (not, to be sure, in respect to the particular property claimed here, but generally in principle), after the close of the Revolutionary War. Mr. Jefferson denied that there had been any violation on the part of the United States of their treaty obligations relative to the confiscated property of British subjects.

By the fifth article of the treaty of peace it was agreed that—

> "The Congress shall earnestly recommend it to the legislatures of the respective States, to provide for the restitution of all estates, rights, and properties, of persons resident in districts in the possession of his Majesty's arms and who have not borne arms against the United States; and that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested in their endeavors to obtain the restitution of such of their estates, rights, and properties as may have been confiscated; *and that Congress shall also earnestly recommend to the several States a reconsideration and revision of all acts or laws regarding the premises*, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation, which, on the return of the blessings of peace should universally prevail; *and that Congress shall also earnestly recommend to the several States that the estates, rights, and properties of such last-mentioned persons shall be restored to them, they refunding to any persons who may be now in possession the bona fide price (where any has been given) which such persons may have paid on purchasing any of the said lands, rights, or properties since the confiscation.*"

In a letter from Mr. Jefferson to the British Minister, dated May 29, 1792, he says, in discussing this article of the

treaty and the obligations of the United States thereunder, and in reply to complaints by the Minister—

> "Observe, that in every other article, the parties agree expressly that such and such things *shall be done*; in this they only agree *to recommend* that they shall be done. You are pleased to say, 'It can not be presumed that the Commissioners, who negotiated the treaty of peace, would engage in behalf of Congress to make *recommendations* to the legislatures of the respective States, which they did not expect to be effectual, or enter into direct stipulations which they had not the power to enforce.' On the contrary, we may fairly presume that, if they had the power to *enforce*, they would not merely have *recommended*.
>
> "When, in every other article, they agree expressly *to do*, why in this do they change the style suddenly and agree only *to recommend*? Because the things here proposed to be done were retrospective in their nature—would tear up the laws of the several States, and the contracts and transactions, private and public, which had taken place under them; and retrospective laws were forbidden by the Constitutions of several of the States. Between persons whose native language is that of this treaty, it is unnecessary to explain the difference between *enacting* a thing to be done and *recommending* it to be done; the words themselves being as well understood as any by which they could be explained. . . . It was impossible that the negotiators on either side should have been ignorant of the difference between agreeing *to do* a thing and agreeing only *to recommend* it to be done. The import of the terms is so different that no deception or surprise could be supposed, even if there were no evidence that the difference was attended to, explained and understood.
>
> "But the evidence on this occasion removes all question. It is well known that the British court had it extremely at heart to procure a restitution of the estates of the refugees who had gone over to their side; that they proposed it in the first conferences, and insisted on it to the last; that our com-

missioners, on the other hand, refused it from first to last, urging, 1st, that it was unreasonable to restore the confiscated property of the refugees, unless they would reimburse the destruction of the property of our citizens, committed on their part; and 2ndly, that it was beyond the powers of the commissioners to stipulate or of Congress to enforce. On this point the treaty hung long. . . .

"Congress did, immediately on the receipt of the definitive articles, to wit, on the 14th of January, 1784, come to the following resolution:

"'Resolved, unanimously, nine States being present, that it be, and it is hereby, earnestly recommended to the legislatures of the respective States to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects; and also of the estates, rights and properties, of persons resident in districts which were in the possession of his Britannic Majesty's arms, at any time between the 30th day of November, 1782, and the 14th day of January, 1784, and who have not borne arms against the said United States; and that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested in their endeavors to obtain the restitution of such of their estates, rights and properties as may have been confiscated; and it is also hereby earnestly recommended to the several States that they reconsider and revise all acts or laws regarding the premises so as to render said laws consistent, not only with justice and equity, but with that spirit of conciliation, which, on the return of the blessings of peace, should universally prevail: and it is hereby also earnestly recommended to the several States that the estates, rights and properties of such last mentioned persons should be restored to them, they refunding to any persons who may be now in possession the bona fide price (where any has been given) which such persons may have paid on purchasing any of said lands, rights or properties, since the confiscation.

> "'Ordered, that a copy of the proclamation of this date, together with the recommendations be transmitted to the several States by the Secretary.'"
>
> Record, Vol. 7, pages 2128 to 2132.

In such matters each nation determines for itself on its own rights, and there is no common tribunal to decide between them. If the course of a nation—

> "has been a plain one its courts would hesitate to pronounce it erroneous,"

says this court; and in the same case it says further:

> "Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."
>
> Foster & Elam *vs.* Neilson, 2 Pet., 307, 314.
> See also United States *vs.* Perchman, 7 Pet., 87.
> Garcia *vs.* Lee, 12 Pet., 516.

In this instance all was done that the treaty required.

The situation was in no wise changed by the Maryland act of 1787, chapter 25, by which it was enacted that the "treaty made between the United States of America and his Britannic Majesty is the supreme law within this State," because under articles 9 and 13 of the confederation the treaty was "the supreme law within the State" as fully and completely as it was after that act was passed.

The treaty does not import an absolute engagement for the return of confiscated property, and it was left optional with the States whether they would provide for its return or not.

If the treaty had provided that such property should be returned it would not have been self-operative, and could not have been enforced by the courts, without legislation, either by Congress, or the legislatures of the States, to carry the engagement into effect.

The Maryland act referred to certainly makes no provision for the return of such property, nor even for an acceptance of the recommendation when it should be made; and in no manner binds the State to accept or carry the recommendation into effect.

The "recommendation" of the treaty simply remained a recommendation as before, and no rights on the part of the original British owners to a return of confiscated property were ever recognized by the State. The acts of confiscation were enforced long after the treaty of peace and the act of the State of 1787, ch. 25.

> Smith *vs.* State, 2 H. & J. 471, and 6 Cranch, 286.
> Norwood's Lessee *vs.* Owings, 2 H. & J. 96, 5 Cr., 344.
> Hepburn's Case, 3 Bl. 116.
> Hall *vs.* Gittings' Lessee, 2 H. & J. 112.
> Stewart *vs.* Donaldson, 5 H. & J. 428.
> Ringgold *vs.* Malott, 1 H. & J. 184.

There remains to be noticed, as coming under this proposition, one further contention made by these defendants in the court below, which was that the private right and title of Henry Harford, last Proprietary of Maryland, to tide and other lands was not affected by the acts of the State confiscating the same, because said acts were unconstitutional and void under the Maryland Declaration of Rights, adopted November 3, 1776.

The Confiscation Act of 1780, Chap. 45, in express terms declares—

> "that all property within this State, debts only excepted, belonging to British subjects, shall be seized and is hereby confiscated to the use of this State;"

by the other act of the same session (Chapter 49) certain commissioners were appointed for the purpose of preserving all British property confiscated by the previous act, and the commissioners so appointed were declared—

> "to be in the full and actual seizin and possession of all British property seized and confiscated by the said act, *without any office found, entry, or other act to be done,*" *etc.*

These acts providing for a seizure and confiscation without any judicial proceeding, and by mere operation of the acts themselves, were claimed to be in contravention of Sections 3, 15 to 21 and 24 of said Declaration of Rights, which declared, among other things—

> "that retrospective laws, punishing facts committed before the existence of such laws, ought not to be made,"

and—

> "that the trial of facts where they arise is one of the greatest securities of the lives, liberty and estate of the people"—

and—

> "that in all criminal proceedings every man hath a right to be informed of the accusation against him. . . . and to a speedy trial by an impartial jury"—

and—

> "that no freeman ought to be . . . disseized of his freehold, liberties or privileges . . . but by the judgment of his peers or by the law of the land"—

and—

> "that there ought to be no forfeiture of any part of the estate of any person for any crime except murder or treason against the State, and then only on conviction and attainder"—

and—

> "that no law to attaint particular persons of treason or felony ought to be made in any case or at any time hereafter."

And the argument was that as no judicial proceedings of any kind were had against Henry Harford, as a British subject, and none were contemplated by the acts, they were not operative to divest said Harford of his title.

The answer to this contention is that the Maryland Declaration of Rights followed the Declaration of the United Colonies "that they are and of right ought to be free and independent States," and that said Declaration of Rights was an enunciation of principles designed to aid in—

> "establishing a good constitution in this State for the surer foundation and more permanent security thereof."

It was the people of this State (section 2), that is, those living and to live in allegiance to it, for whom the government was established and upon whom it was to operate. The provisions of the Declaration of Rights were intended for the benefit of the members of the new political community and not for the protection of the property rights of its alien enemies against whom only the confiscation acts were directed.

> "The right to confiscate the property of enemies during war, is derived from *a state of war*, and is called the *rights of war*. This right originates from *self preservation*, and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. *Justice*, also, is another pillar on which it may rest, to wit, a right to reimburse the expense of an *unjust* war."
>
> Ware, Adm'r of Jones, *vs.* Hylton et al., 3 Dall. 227.

The confiscation acts of Maryland, after reciting that Great Britain had commenced an unjust war against the United States, and had confiscated the property of the citizens of some of the States, and that the British army and navy, acting under the authority of the British King, had seized and carried off and disposed of the property of the citizens of the States, at their will and pleasure, and had committed various outrages on the persons and devastations on the property of the people of the United States, etc.; and that by the Declaration of Independence all political connection between Great Britain and the States was dissolved and the subjects of Great Britain declared enemies in war, further declares that—

> "by the law of nations the subjects of Great Britain, in their separate and collective capacity, are answerable, not only for all the expenses incurred by this State in consequence of the war, but for any injury or damage sustained by any of the subjects of this State since the commencement thereof, and their property, wherever found, is subject to seizure and confiscation;"

wherefore it is enacted in the language above given that all British property in the State, debts excepted, shall be seized and confiscated to the use of the State.

Of these acts which dispensed with all inquisitions or judicial proceedings, it was said by this court:

> "It would seem difficult to draft a law more completely operative to divest the whole estate of the former owner and to vest it in the State. . . . It is true that the word *property*, used in both laws, means the thing itself intended to be affected by them, whether it were land or personal property; but then it is equally clear that the thing itself, whatever it might be, ceased by the operation of these laws to belong to the British subject and became vested in the commissioners for the use of the State."
>
> Smith *vs.* State, 6 Cr., 286.

That these acts were completely efficient to vest in the State the title to all property of British subjects has been uniformly sustained by the courts of Maryland.

III.

The third proposition contended for by the Marshall heirs in the court below was substantially this:

That if the confiscation acts of Maryland were effective to divest the title of the Proprietary, under the charter, to tide lands (his title thereto being considered the same as that to other lands), then the confiscations of such lands which took place under said acts constituted forfeitures, within the intent and meaning of the term as used in the letters-patent for the Northern Neck, which granted, in addition to rights of soil in the territory described, "all and all manner of deodands, goods of felons and fugitives, . . . fines, forfeitures, escheats . . . within the limits and precincts aforesaid, which now or at any time hereafter shall be had, coming, being, arising, growing, accruing, found or taken within the bounds, limits and precincts aforesaid;" and that the former title of the Maryland Proprietary, by virtue of this provision of the Northern Neck grants, and through such confiscations, became vested in Lord Culpeper or his successors.

The matters of fact and of law relied on to support the contention were:

1. All titles to lands in Maryland and Virginia are derived from and traceable to the king.

2. In 1632 the king granted the Potomac River to Lord Baltimore.

3. In 1688 the king granted the same river to Lord Culpeper, grants of 1649 and 1660 becoming merged in this.

4. That the king granted to Culpeper forfeitures to accrue, and that he had the right to do so; that the king's grant is a contract, and that he is estopped, although the grant be void as to Lord Baltimore.

5. The new State is estopped by the deed of the old State, king or government. "The King is dead. Long live the King. The Sovereign never dies."

6. The State of Maryland, and its successor, the United States, are estopped from asserting a claim against the deed or grant of the old sovereign and King of Great Britain, and to avoid its contractual obligations, and the rights of the grantee, as much so as if the State of Maryland or the United States, sought to invalidate its own deed or grant.

7. Lord Fairfax could not be deprived legally, and was not, of his right to the bed of the Potomac River, if forfeited under the Confiscation Acts of Maryland.

The answer to the contention is plain: The forfeitures contemplated in the letters-patent for the Northern Neck were such only as should arise under the continued dominion of the king, and be caused by the failure or neglect of one of his subjects to perform some duty to the king, and enjoined upon him by his allegiance to the king; and not such as might arise through the events of a revolution ending in the downfall of the king and the overthrow of his dominion.

Forfeitures of the latter class did not, and in the nature of things could not, accrue to the old sovereign, but only to the new one, by whom they were created, and who had overthrown the dominion of the old one, and whose very existence was based upon the repudiation of the personal and political rights of its predecessor.

Blackstone states that forfeitures were among the prerogative rights of the King, and a branch of his royal revenue. 1 Comm. 240, 281, 299. Depending upon the matter of allegiance, a grant of them, in any instance, could therefore not survive the loss of his dominion.

There is and can be, under the circumstances, no privity between the King, the State, and the United States and Lord Culpeper, or those claiming under him, which can operate as the basis for the estoppel claimed. The new State did not obtain its sovereignty through any grant of the King and the previous abandonment by the King in the

interest of a subject of one of the rights of government can not possibly bind the new sovereign.

The absurdity of the consequences which would result from the application of the doctrine of forfeiture contended for by the defendants sufficiently refutes its soundness; the confiscation being based upon the loyalty of the Maryland Proprietary to the King, it would have the paradoxical effect of operating to transfer that Proprietary's property rights to another who had not remained loyal to the King, but who had, in contravention of his duty to him, become a citizen of Virginia, which had united with Maryland and other States in overthrowing the dominion of the King. Fairfax remained in Virginia after the outbreak of the war, and died there in 1781; that he was "an inhabitant and citizen" of the State, as claimed by the defendants, is conceded.

Hunter's Devisee *vs.* Fairfax's Lessee, 7 Cr. 603.

As we have already seen, upon the authority of Blackstone, the inclusion by the king of the Potomac River within the patent to Lord Baltimore rendered void so much of the subsequent grants for the Northern Neck as included it in them, and it must be considered as excluded from them. Such exclusion of the river from the territory of the Northern Neck involved of necessity the exclusion of the forfeitures, whatever their nature might be, which were to accrue within the "limits and precincts" only of the Northern Neck grants.

The entire contention of the defendants under this head assumes title in the Proprietary of Maryland to the beds and shores of tide-waters in the premises, as his purely private property, disconnected from the powers of government; a position which we contend can not possibly be maintained under the decision in Martin *vs.* Waddell; but even if they were such property, and subject to forfeiture, the contention is equally unsound as has been thus shown.

It has been shown, as a matter of law and of fact, that the claim of title of the Marshall heirs under the deed from Denny Martin Fairfax to James (M.) Marshall, and alleged to have its origin in the Northern Neck grants, and the claim made under the deed from Frederick Paul Harford, alleged to have its origin in the letters patent to Lord Baltimore, are without merit. It may be furthermore said that, if the defendants and their predecessors in title, ever had any rights in the premises, such rights have been lost by their failure for upwards of one hundred years heretofore to assert them. The claims made here may with equal justice be urged against every grant made by the State of Maryland, of land formerly the property of the Proprietary; these grants cover a large portion of the State's area, and to sustain the contentions made here would obscure and unsettle all titles under such grants. Under the authority of the State, many acts have been done—such as the construction of dams and wharves in the Potomac river—during the above period, which have been acquiesced in without objection on the part of the defendants or their predecessors in title, and which constitute in principle infringements upon the pretended property rights claimed as much as those done under the authority of the United States, in the present instance.

The courts of the country were open to them, for by the 9th section of the treaty of amity and commerce of 1794, it was provided that—

> "British subjects who now hold lands in the territories of the United States . . . shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and *the legal remedies incident thereto*, be regarded as aliens."

APPENDIX A.

Acts of Assembly of Maryland and Virginia, Relating to Settlement of Boundary Line between them, and the Act of Congress Consenting to the Award.

MARYLAND.

CHAPTER 247. An act to designate the arbitrators to ascertain and fix the boundary between the States of Viginia and Maryland.

[Approved, April 11, 1874.]

Whereas, a controversy exists as to the true line of the boundary between the States of Virginia and Maryland; and,

Whereas, the State of Virginia, by an act of its General Assembly, entitled an act to designate the arbitrators, to ascertain and fix the boundary between the States of Maryland and Virginia, approved on the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and seventy-four, has declared its willingness to submit the said controversy to arbitration, and to accept as final and conclusive, such award as may be made in the premises; therefore—

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the settlement and determination of the true line of boundary between the States of Virginia and Maryland, be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, who are hereby requested to act as arbitrators, and to ascertain and determine the true line of boundary between

the said States of Virginia and Maryland, and deliver their award in writing, any two of them concurring therein. Each State shall have the right to be represented by counsel before said arbitrators, subject to such regulations as they may prescribe; and the State of Maryland hereby pledges its faith to accept and abide by the award of said arbitrators in the premises as final and conclusive; provided, however, that neither of the States, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said States and the citizens thereof, forever.

SEC. 2. *And be it enacted*, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake Bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two States; and the Governor is hereby requested to forward a copy of this act to the Governor of Virginia.

SEC. 3. *And be it enacted*, that this act shall be in force from its passage.

CHAPTER 198. An act supplementary to an act to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland, approved April the eleventh, eighteen hundred and seventy-four.

[Approved April 3, 1876.]

Whereas, by an Act of the General Assembly of Maryland, passed at the January session, eighteen hundred and seventy-four, chapter two hundred and forty-seven, entitled "An act to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland;"

it was provided that the settlement and determination of the true line of boundary between the States of Virginia and Maryland, be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, and they did select accordingly as a third person, the Honorable Charles A. Jenkins, of Georgia, but the said William A. Graham has since departed this life; now for filling the vacancy thereby created, and for carrying out the purposes of the said act; therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland*, with the concurrence of the State of Virginia, That the said Honorable Jeremiah S. Black, and the Honorable James B. Beck, of Kentucky, and the said Honorable Charles A. Jenkins, do proceed to ascertain and determine the true line of boundary between the States of Virginia and Maryland, and do make and deliver their award in writing, any two of them concurring therein. Each State shall have the right to be represented by counsel before the arbitrators under such regulations as they may prescribe, and the State of Maryland hereby pledges its faith to accept and abide by the award of the said arbitrators in the premises, as final and conclusive; provided, however, that neither of the said States, nor the citizens thereof, shall by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them, entered into in the year seventeen hundred and eighty-five; but that the same shall remain to, and be enjoyed by the said States, and the citizens thereof forever; and provided, further, that the landholders on either side of the line of boundary between the said States as the same may be ascertained and determined by the said award, shall in no manner be disturbed thereby in their title to and possession of their lands, as they may be at the date of said award, but shall in any case, hold and possess the same, as if their said titles and possession had

been derived under the laws of the State, in which, by the fixing of the said line by the terms of the said award, they may be ascertained to be.

SEC. 2. *And be it enacted*, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two States.

SEC. 3. *And be it enacted*, That if, in the recess of the legislature a vacancy shall occur by reason of death, resignation or refusal to act, of any of the persons herein appointed to settle and determine the said line of boundary as aforesaid, a fit person or persons shall be appointed by the concurrent action of the Governor of Maryland, and the Governor of Virginia, or of the Legislature of the latter State, as the case may be, who with those already appointed, and who may act in the premises, shall exercise the powers and perform the duties defined and imposed in the first section of this act.

SEC. 4. *And be it enacted*, That the Governor is hereby requested to forward a copy of this act to the Governor of Virginia, with a request that he present the same to the General Assembly of that State, and that he communicate to the Honorable James B. Beck, his appointment under this act, and request his acceptance of the same.

SEC. 5. *And be it enacted*, That this act shall take effect from the date of its passage.

CHAPTER 374.—An act to provide for surveying and marking the boundary line between the States of Maryland and Virginia, as ascertained and determined by the arbitrators heretofore appointed on the part of Maryland and Virginia respectively.

[Approved April 1, 1878.]

Whereas the arbitrators to whom were submitted the controversies between the States of Maryland and Virginia,

concerning their territorial limits, have filed their award determining and declaring the boundary line of the said States, so far as they are conterminous; and whereas, it is necessary that said boundary line should be surveyed and designated by monuments of a durable character, so that its precise location may be readily ascertained by the citizens of each of the aforesaid States; therefore—

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That when the said award shall have been accepted by the State of Virginia, and shall have been ratified by Congressional legislation, it shall then be the duty of the Governor of this State to nominate and appoint a commissioner, who, together with a commissioner or commissioners, to be appointed by said State of Virginia, shall, in concert with each other, have the said line surveyed, and so far as practicable and necessary, shall have the same defined and marked by suitable monuments; and to the end that said line may be run by persons of the highest skill, and as the same is a matter of federal concern, the Governor is directed to solicit the War Department at Washington to detail one or more of the topographical engineers of the United States, who shall run, mark and bound said line with such monuments to be placed therein, of the kind, number and description that the said engineers shall order and direct.

CHAP. 274. An Act to approve, confirm and ratify the award made by the Honorable Jeremiah S. Black, James B. Beck and Charles A. Jenkins, arbitrators appointed to ascertain and fix the boundary between the States of Virginia and Maryland.

[Approved April 4, 1878.]

Whereas by an act of the General Assembly of Maryland, passed at January session, eighteen hundred and seventy-six, chapter one hundred and ninety-eight, it was provided

that the settlement and determination of the true line of boundary between the States of Virginia and Maryland should be referred to the Honorable Jeremiah S. Black, of Pennsylvania, the Honorable James B. Beck, of Kentucky, and the Honorable Charles A. Jenkins, of Georgia, with power to make and deliver their award in writing, any two of them concurring therein, and did thereby pledge the faith of this State to accept and abide by the award of said arbitrators, as to said boundary line as final and conclusive, with the proviso and saving clauses, as to private rights, as in the said act set forth; and, whereas the said arbitrators did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to wit:

Award.—And now to wit: January sixteenth, Anno Domini, eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators to whom the States of Virginia and Maryland, by acts of their respective legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of the said States and examined the proofs on both sides, do find, declare, award, ascertain and determine that the true line of boundary between the said States, so far as they are conterminous with one another, is as follows, to wit:

Beginning at the point on the Potomac River where the line between Virginia and West Virginia strikes the side of the river at low water mark, and thence following the meanderings of said river by the low water mark to Smith's Point, at or near the mouth of the Potomac. . . .

In further explanation or this award the arbitrators deem it proper to add that—

. . . . . .

3rd. The low water mark on the Potomac River, to which Virginia has a right in the soil, is to be measured by the same rule, that is to say, from the low water mark at one

headland to low water mark at another, without following indentations, bays, creeks, inlets or affluent rivers.

4th. Virginia is entitled not only to full dominion over the soil to low water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low water mark as may be necessary to a full enjoyment of her riparian ownership without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

And which said award is now deposited with the map accompanying the same in the Land Office of this State, among the muniments of title; now, therefore,

Section 1. *Be it enacted by the General Assembly of Maryland*, That the said award is hereby approved, accepted, confirmed and ratified, and that as soon as the same is also approved, accepted, confirmed and ratified by the General Assembly of the State of Virginia, and by the Congress of the United States, thereupon and immediately thereafter the said award and survey matter and things therein contained shall be obligatory on the State and the citizens thereof, and shall be forever faithfully and inviolably observed, and kept by this State and all its citizens, according to the true intent and meaning of the same, and to that end the faith of this State shall stand pledged.

Sec. 2. *And be it enacted*, That the Governor is hereby requested to forward a copy of this act to the Governor of Virginia, with a request that the General Assembly of said State shall also enact a law in accordance herewith; and, shall, also, forward a copy to our Senators and Representatives in Congress, with a request that they procure such legislation on the part of the United States as may be needful in the premises for their assent to and ratification of said award.

VIRGINIA.

CHAP. 135.—An act to designate the arbitrators to ascertain and fix the boundary between the States of Maryland and Virginia.

[Approved, March 28, 1874.]

Whereas, a controversy exists as to the true line of boundary between the States of Maryland and Virginia; and whereas, the State of Maryland, by resolutions of its general assembly now in session, has declared its willingness to submit the said controversy to arbitration, and to accept as final and conclusive such award as may be made in the premises; therefore—

1. Be it enacted by the General Assembly of Virginia, That the settlement and determination of the true line of boundary between the States of Maryland and Virginia be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, who are hereby requested to act as arbitrators, and to ascertain and determine the true line of boundary between the said States of Virginia and Maryland, and to make and deliver their award in writing, any two of them concurring therein. Each State shall have the right to be represented by counsel before said arbitrators, subject to such regulations as they may prescribe. And the state of Virginia hereby pledges its faith to accept and abide by the award of said arbitrators in the premises, as final and conclusive; provided, further, that neither of the said states, nor the citizens thereof, shall by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever.

2. And be it further enacted, That until the final adjustment and settlement of the said line of boundary, the tem-

porary line across the Chesapeake bay known as the Lovett-Davidson line shall be faithfully observed by the citizens of the said two states.

3. The governor is hereby requested to forward a copy of this act to the governor of Maryland, with a request that he present the same to the general assembly of that State for their concurrent action in the premises.

4. This act shall be in force from its passage.

CHAP. 226. An Act to provide Counsel to appear before the Arbitrators on the Boundary between this State and Maryland, and making an Appropriation to pay the expenses of said Arbitration.

[Approved April 22, 1874.]

Whereas, an act has been passed by the general assembly for submitting the question of the true line of boundary between this State and Maryland, to the arbitrament and award of the honorable Jeremiah S. Black, honorable William A. Graham, and a third person, to be selected by them; and whereas, it is provided by said act that Virginia shall have the right to be represented by counsel before said arbitrators; now—

1. Be it enacted, That the attorney general of this State, shall represent Virginia, as counsel, before said arbitrators; and should the governor deem it advisable to employ assistant counsel, then he shall associate with the attorney general, for that purpose, such person as to him may seem proper.

2. For the purposes of this act, and to defray the charges that may be incurred under the act first herein referred to, five thousand dollars are hereby appropriated, out of any money in the treasuary not otherwise appropriated, to be paid, or so much thereof as may be necessary, on the order of the governor.

3. This act shall be in force from its passage.

CHAP. 48. An Act to amend and re-enact an act to designate the Arbitrators to Ascertain and Fix the Boundary of the States of Maryland and Virginia, approved March twenty-eighth, eighteen hundred and seventy-four.

[Approved February 10, 1876.]

Whereas, by an act of the general assembly, approved March twenty-eighth, eighteen hundred and seventy-four, entitled an act to designate the arbitrators to ascertain and fix the boundary between the states of Maryland and Virginia, it was provided that the settlement and determination of the true line of boundary between the states of Maryland and Virginia be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, and they did select accordingly, as a third person, the Honorable Charles A. Jenkins, of Georgia, but the said William A. Graham has since departed this life; now, for filling the vacancy thereby created and for carrying out the purposes of the said act; therefore—

1. Be it enacted, with the concurrence of the state of Maryland, That the said Honorable Jeremiah S. Black and Honorable J. B. Beck of Kentucky, with the said Honorable Charles A. Jenkins, as arbitrators, do proceed to ascertain and determine the true line of boundary between the said states of Maryland and Virginia, and do make and deliver their award in writing, any two of them concurring therein. Each state shall have the right to be represented by counsel before the arbitrators, under such regulations as they might prescribe. And the state of Virginia hereby pledges its faith to accept and abide by the award of the said arbitrators in the premises, as final and conclusive; provided however, that neither of the said states, nor the citizens thereof, shall by the decision of the said arbitrators be deprived of any of the rights and privileges enumerated and set forth in the compact between

them, entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever; and provided further, that the landholders on either side of the line of boundary between the said states, as the same may be ascertained and determined by the said award, shall in no manner be disturbed thereby in their title to and possession of their lands, as they may be at the date of said award, but shall in any case, hold and possess the same, as if their said titles and possession had been derived under the laws of the state in which, by the fixing of the said line by the terms of the said award, they may be ascertained to be.

2. And be it further enacted, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake Bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two states.

3. Be it further enacted, That if, in the recess of the legislature, a vacancy shall occur by reason of death, resignation, or refusal to act of any of the persons herein appointed, to settle and determine the said line of boundary as aforesaid, a fit person or persons shall be appointed by the concurrent action of the governor of Virginia, and of the governor of Maryland, or of the legislature of the latter State, as the case may be, who with those already appointed and who may act in the premises, shall exercise the powers and perform the duties defined and imposed in the first section of this act.

4. The governor is hereby requested to forward a copy of this act to the governor of Maryland, with a request that he present the same to the general assembly of that State for their concurrence in the premises, and that he communicate to the Honorable James B. Beck his appointment under this act and request his acceptance of the same.

5. This act shall be in force from its passage.

CHAP. 246. An act to approve, confirm and ratify the award made by the arbitrators appointed to ascertain and fix the boundary between the States of Virginia and Maryland, and procure the assent of the Congress of the United States thereto.

[Approved March 14, 1878.]

Whereas, by an act of the general assembly of Virginia, approved March twenty-eight, eighteen hundred and seventy-four, and an act amendatory thereof, approved February tenth, eighteen hundred and seventy-six, it was provided that the settlement and determination of the true line of boundary between the states of Virginia and Maryland should be referred to the Honorable Jeremiah S. Black, of Pennsylvania, the Honorable James B. Beck of Kentucky, and the Honorable Charles A. Jenkins of Georgia, with power to make and deliver their award in writing, any two of them concurring therein; and did thereby pledge the faith of this state to accept and abide by the award of said arbitrators, as to said boundary line, as final and conclusive, with the proviso and saving clauses as to private rights as in the said acts set forth; and whereas the said arbitrators did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to wit:

. . . . . .

(For the award see Rec., Vol. 7, p. 2124.)

And which award is now deposited with the map accompanying the same, in the office of the secretary of the commonwealth; now, therefore—

1. Be it enacted by the general assembly of Virginia, That the said award is hereby approved, accepted, confirmed, and ratified, and that as soon as the same is also approved, accepted, confirmed, and ratified by the general assembly of the state of Maryland, and by the Congress of the United States, thereupon and immediately thereafter

the said award and survey, matter and thing therein contained, shall be obligatory on the state and citizens thereof, and shall be forever faithfully and inviolably observed, and kept by this state and all its citizens, according to the true intent and meaning of the same, and to that end the faith of this state shall stand pledged.

2. The governor is hereby requested to forward a copy of this act to the governor of Maryland, with a request that the general assembly of said state shall also enact a law in accordance herewith; and shall also forward a copy to our senators and representatives in Congress, with a request that they procure such legislation on the part of the United States as may be needful in the premises for their assent to and ratification of said award.

3. This act shall be in force from its passage.

CHAP. 90. An Act in relation to the boundary line between Virginia and Maryland.

[Approved April 2, 1879.]

Whereas the arbitrators appointed to ascertain the boundary line between the states of Virginia and Maryland have filed their award, which award has been ratified by said states, and approved and accepted by the Congress of the United States; and whereas it is necessary that said boundary line shall be marked and designated by suitable monuments, so that its precise location may be accurately and readily ascertained by the citizens of each of the aforesaid states; therefore—

1. Be it enacted by the General Assembly of Virginia, That it shall be the duty of the governor to nominate and appoint a commissioner, who, together with a commissioner or commissioners, to be appointed by the State of Maryland, shall, in concert with each other, have the said line surveyed, and so far as practicable and necessary shall have

the same marked and defined by suitable monuments; and to the end that said line may be run by persons of the highest skill, and as the same is a matter of federal concern, the governor is directed to solicit the war department at Washington to detail one or more of the topographical engineers of the United States, who shall run and mark and bound said line with such monuments to be placed thereon of the kind, number and description that the said engineers shall order and direct.

2. The commissioner above-named shall, as soon as the work is completed, submit his report to the governor, and his compensation shall be ascertained and allowed by the next general assembly; but the auditor of public accounts shall issue his warrant on the treasury upon the certificate of the governor for so much money as may be necessary to pay the current expenses of the work contemplated in this act; provided, that the sums so expended shall not exceed the sum of three hundred dollars appropriated by the act approved February twenty-five, eighteen hundred and seventy-eight, and the additional sum of one thousand five hundred dollars appropriated by the act approved March fourteen, eighteen hundred and seventy-eight, entitled an act appropriating the public revenue for the fiscal year eighteen hundred and seventy-seven, seventy-eight.

3. The said warrant shall be drawn in faver of the commissioner appointed under this act, and the said commissioner shall disburse the same to those entitled thereto, of which disbursement said commissioner shall keep an account and report with vouchers to the governor when his work shall have been completed.

4. Before entering upon the discharge of his duties under this act, the commissioner shall execute a bond payable to the commonwealth of Virginia, in the sum of ten thousand dollars, to be approved by the judge of the county wherein the said commissioner may reside, conditioned for the faithful discharge of his duties, which bond, when so approved,

shall be forw[illegible]led to the auditor of public accounts to be filed in his o[illegible]e.

5. This ac[illegible]all be in force from its passage.

UNITED STATES.

CHAP. 196. An act giving the consent of Congress to an agreement or compact entered into between the States of Virginia and Maryland, respecting the boundary between said States. (20 Stats., 481.)

[Approved March 3, 1879.]

Whereas arbitrators duly appointed on the part of the State of Virginia and on the part of the State of Maryland for the purpose of ascertaining and fixing the boundary between the States of Virginia and Maryland, did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to wit:

. . . . . .

(For the award see Record, Vol. 7, p. 2124.)

And whereas the said award has been ratified and confirmed by the legislatures of the States of Virginia and Maryland, respectively: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement or award, and to each and every part and article thereof: *Provided*, That nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award.

CLASS 2.

The claims of ownership made to part of the reclaimed land by certain defendants, who assert title under a patent issued by the United States, through the General Land Office, to John L. Kidwell, in the year 1869, for 47.71 acres, and to 150 acres of alleged accretion thereto; and to another tract, the area of which is not stated, adjoining the Long Bridge and extending therefrom southwardly between the Washington and Georgetown channels, of which latter tract they claim to be the equitable owners under an application for a patent made by said Kidwell in 1871.

The Proceedings in the General Land Office.

This patent (Record, Vol. 1, p. 17) is dated December 6, 1869; upon the face of the instrument it appears to have been executed upon a survey said to have been made and returned by the surveyor of Washington County, in the District of Columbia, pursuant to a special warrant of survey directed to him by the Commissioner of the General Land Office, dated June 26, 1867, and—

> "in virtue of the authority of Congress under a resolution 'directing the manner in which certain laws of Maryland shall be executed,' approved on the 16th day of February, 1839."

The record shows that two warrants of survey were issued, on applications for the same by said Kidwell, one *dated June 26, 1867* (Record, Vol. 5, p. 72), to affect certain land described "as a flat or bar in the Potomac River" adjoining the Long Bridge; the other dated *September 12, 1867* (Record, Vol. 1, p. 25), to affect certain land described as—

> "an island situated in the Potomac River, containing fifty (50) acres, more or less, lying between the Washington city channel and the swash channel, commencing nearly opposite Fifteenth (15th) street west and extending up to a point opposite to where

> D street north strikes the canal or river, and as much further up stream as firm unclaimed land is found."

Each warrant directs the surveyor "to lay out" and "carefully survey for and in the name of the said John L. Kidwell" the "vacant land" claimed; and each warrant contains this proviso, "*provided, the same is a firm land, and not subject to tidal overflow,*" and directs the surveyor to make return of such survey, etc.

The recital in the patent that the tract therein described, which is called "Kidwell's Meadows," is granted in pursuance of "a special warrant of survey unto the said surveyor, directed on the 26th day of June, A. D. 1867," is an erroneous one; the surveyor made two returns or certificates of survey, each of which is stated on its face to have been made pursuant to the warrant of June 26, 1867. One of these returns is for $15\frac{25}{100}$ acres of land adjoining the Long Bridge (see map between pp. 72 and 73, Record, Vol. 5), and the other is for $47\frac{71}{100}$ acres further up the river, and being apparently the land referred to in the warrant of September 12, 1867, as to which latter there is no return of survey.

The first application of said Kidwell for a warrant of survey (Record, Vol. 5, p. 69), is dated June 10, 1867, and sets forth under oath that there is a—

> "vacant or unclaimed tract of land situate in Washington county, District of Columbia, to wit, a certain flat or bar in the Potomac River between the Virginia and Maryland channels and adjoining the Long Bridge on the upper side thereof, containing about twenty (20) acres of land, more or less;"

and that the applicant desires to appropriate the same under the joint resolution of 1839. The next application of said Kidwell (Record, Vol. 1, p. 26), which is dated September 2, 1867, sets forth under oath that he is desirous—

"to appropriate and enter a vacant or unclaimed tract of land situate in Washington county, District of Columbia, to wit: an island situated in the Potomac River, containing fifty (50) acres, more or less, lying between the Washington City channel and the swash channel, commencing nearly opposite to Fifteenth (15th) street west, and extending up to a point opposite to where D street north strikes the canal or river, and as much farther up stream as firm unclaimed land is found."

The resolution referred to in the patent and in the applications and warrants of survey will be found on pages 364 and 365 of Volume 5 of the Statutes at Large, and reads as follows:

"No. 3. A RESOLUTION DIRECTING THE MANNER IN WHICH CERTAIN LAWS OF THE DISTRICT OF COLUMBIA SHALL BE EXECUTED.

"RESOLVED, *by the Senate and House of Representatives of the United States of America in Congress assembled,* That the acts of the State of Maryland for securing titles to vacant land, which were continued in force by the act of Congress of the twenty-seventh of February, eighteen hundred and one, in that part of the District of Columbia which was ceded to the United States by that State, and which have heretofore been inoperative for the want of appropriate officers or authority in the said District for their due execution, shall hereafter be executed, *as regards lands in the County of Washington and without the limits of the City of Washington,* by the Secretary of the Treasury, through the General Land Office, where applications shall be made for warrants, which warrants shall be directed to the surveyor for the County of Washington; who shall make return to the Commissioner of the General Land Office; and payment for said land, according to the said laws of Maryland, shall be made tc the Treasurer of the United States, whose certificate of such payment shall be presented to the Commissioner of the General Land Office, who shall thereupon issue, in the usual form of

> patents for lands by the United States, a patent for such land to the person entitled thereto; and the Secretary of the Treasury shall make such regulations as he may deem necessary; and shall designate the officers who shall carry the said acts into effect; *Provided, That any land which may have been ceded to, or acquired by the United States for public purposes shall not be affected by such acts.*
>
> "Approved February 16, 1839."

At the time of the passage of this Joint Resolution the General Land Office was a bureau of the Treasury Department; by the Act of Congress of March 3, 1849, (9 Stat. 395) establishing the Interior Department, it was transferred to that department; the transfer does not seem to affect, in any way, the Joint Resolution of 1839.

The Secretary of the Treasury, under date of August, 1839, promulgated certain regulations, and designated therein officers to carry the resolution into effect (Vol. 1, Pleadings, p. 19 and Vol. 2, p. 356); the 8th of these regulations directed, in regard to the mode of proceeding, that Kilty's Land Holder's Assistant should be followed as a general guide; the 12th directs the surveyor to "execute warrants according to law, and such instructions as he may from time to time receive," and to make return to the Commissioner.

These regulations are inserted in Appendix B to this branch of the brief (p. **216**).

Upon the return by the surveyor to the Land Office of the two certificates of survey, Stephen J. Dallas, styling himself "Principal clerk of surveys and *ex officio* Examiner General," made a report to the Commissioner of the General Land Office, (Record, Vol. 1, p. 27), in which he states that:—

> "In order to pass upon the surveys understandingly, and to see whether the surveys were executed in accordance with the terms of the warrants of survey, it was found necessary to examine the premises,"

which he states that he did in person, on February 13, 1868, in company with an employe of his office "*reaching the localities on ice*," and that they found "the premises in both instances *to be under the ice in the Potomac river, presenting no appearance of land*," and that—

> "finding the premises to be, in both instances, *submerged and subject to tidal overflow*, and, of course, such land not fit for vacant cultivation, as required by the 3d section of the Act of November session, 1781, Chap. 20, *vide* Kilty's Land Holder's Assistant, page 309, it becomes my duty to reject the surveys and endorse them in each case 'disallowed,' and stating my reasons therefor."

He then states that, finding the surveys in both instances to be "*in total disregard of the law and instructions embodied in the warrants of survey*," he delivers the plats of survey with the request that the commissioner cause the applicant, Mr. Kidwell—

> "to be notified of the rejection of the surveys made, and also the surveyor of the county, so that the latter may cancel such surveys on his records, for the reasons hereinbefore stated."

Thereupon, and under date of February 29, 1868, (Record Vol. 1, pp. 40–41) the Commissioner of the General Land Office notified the surveyor of the report of the Examiner-General rejecting and disallowing the surveys and directing the surveyor "to cancel the same on the records" in his office, and saying—

> "*It was your duty under the authority of the warrants to have ascertained, if you had not been cognizant of the fact, whether or not the alleged vacant lands were subject to the tidal overflow, and not to have represented the premises as land, which is palpably evident to be nothing but bars or flats liable to be submerged by every tide.*"

On the same day, February 29, 1868, the Commissioner of the General Land Office notified Mr. Kidwell (Record,

Vol. 1, p. 41), that the surveys returned on the warrants issued upon his applications of June 10 and September 12, 1867—

> "for warrants of survey of alleged vacant tracts of land in the Potomac River opposite the City of Washton, in the District of Columbia"—

had been reported upon adversely and rejected because said surveys had been made in disregard of the warrants—

> "*there being no land visible above the surface of the ice, but entirely submerged and, of course, subject to tidal overflow.*"

On September 11, 1869, and *nineteen months* after the rejection and cancellation of the surveys, "John Wilson, Att'y for Kidwell," requested the Commissioner of the General Land Office (Record, Vol. 1, p. 29), to cause the Examiner-General "to make a new examination" of the premises mentioned in the certificates of survey and stating that for the purpose "a carriage will be placed at his disposal," and that "Dr. Kidwell and the surveyor will go with him to point out the land;" and asking that, if the examination should prove satisfactory, patents be issued for the lands. The reasons for the requests are stated to be that—

> "when your examiner examined the land the whole country was covered with sleet, snow and ice, as will be seen by the affidavit of John Wilson, of the 10th of September, 1869, and hence the mistake into which he (the examiner) was led, in reporting that the land surveyed was submerged and subject to tidal overflow."

With this application of John Wilson, as attorney for Kidwell, the affidavit of said Wilson was filed (Record, Vol. 1, p. 36). In this affidavit he quotes from the report of Dallas, that there was "no visible land above the surface of the ice," and says of it—

> "that the whole city and country in the neighborhood at that time was in the same situation. The fact is that there had been a heavy fall of snow, sleet and rain, and a pretty severe spell of cold had frozen the same, so that the whole surface of the surrounding country was completely covered by the ice, and no land visible above it, except where the ice had been broken by travel, or the land had been protected from the storm."

Affidavits of other persons were also filed tending to show that Kidwell's Meadow was an island separated from the main shore of the city by a channel, through which the steamer "Enterprise" had sailed, etc.

This request of Kidwell's attorney, and its accompanying affidavits, may be passed for the present, but will be the subject of animadversion hereafter.

Thereupon, *and without renewal of the warrants of survey, the old ones having been canceled,* as we have seen, and upon the showing made by the affidavits, the commissioner directed such re-examination to be made; and Mr. Dallas, under date of November 10, 1869, reported to the commissioner that he had made such re-examination. This report concludes as follows:

> "My inspection of the premises twenty months ago surveyed from the surface of the ice covering the same, *was at variance with the present one.* . . . and, although the Kidwell meadows are hardly yet fit to produce successful crops of corn or garden vegetables, the land, nevertheless, is susceptible of producing fodder and affording pasture for the cattle, and as such requires at my hands the rescinding of the former rejection of the Kidwell meadows."

As to the land adjoining the Long bridge, he adhered to his former opinion.

The issue of the patent for the tract called Kidwell's Meadows described as containg $47\frac{7}{100}$ acres, followed this report.

No Jurisdiction in the General Land Office to Issue the Patent.

By the testimony of numerous witnesses, taken on the part of the United States, and of certain defendants, the Engineer Officers having charge of the work of improvement and others, all familiar with the locality and many of them long residents of its immediate vicinity, it is established that in 1867, and prior thereto, and down to the time when the reclaiming of the flats began, they were subject to overflow by every tide, and were at no time entirely bare of water except when there had been a general lowering of the water in that part of the river by reason of long continued high winds from the west and northwest, and that there had not been during their recollection a channel along the towpath of the canal; that the water along the towpath of the canal was rendered slightly deeper than at other points by a "drain" which was caused by the action of the tides, and that near the site of the old glasshouse, about midway between Easby's Point and Seventeenth street, there was an elevation in the "drain" which caused the tides, when receding, to flow from it up the river towards Easby's Point and down the river in the direction of Seventeenth street. And that the so called Washington channel above the mouth of the former Goose or Tiber creek at the foot of Seventeenth street, shown upon the early maps of the city, had been destroyed by the construction of the towpath of the Chesapeake and Ohio Canal in 1839. (Record, Vol. 2, pp. 3 to 411; Vol. 3, pp. 997–1005.) The substance of the testimony upon this point will be found in Appendix C to this brief, (p 219 .)

The patent for the "Kidwell Meadows" purports to grant in fee, without qualification of any kind, $47\frac{71}{100}$ acres of what it describes as "vacant land" and as "lying in the Potomac River;" that this description is literally true, and that the land it was designed to deprive the public of was, prior to the improvements, a part of the bottom of the river,

in the harbor of the city of Washington, is overwhelmingly shown by the evidence.

The acts of Maryland "for securing titles to vacant land" referred to in the Joint Resolution of 1839, as being such as "*were continued in force by the act of February 27, 1801,*" the only contention which can be made for the validity of the Kidwell patent must be based upon the assumption that on the date last mentioned there existed an act or acts of Maryland by which provision was made for the grant by the State to individuals of the beds of the tidal waters of the State, and that such acts were continued in force in the District of Columbia by said act of 1801.

If no such act or acts were then in existence, the grant is of course an absolute nullity, and can not operate to confer any title whatsoever upon the grantee or any one claiming under him; for it is well settled that the United States are not bound by the acts of public officers which are beyond the scope of their authority, and that this patent was issued without any authority of law is manifest.

That such is the predicament of the grant is the ground of our first contention as to its invalidity.

In the case of Doolan *vs.* Carr, 125 U. S. 618, 624, it is said:

> "There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void — void for want of power in them to act on the *subject matter* of the patent, not merely

> voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable and should therefore be avoided. . . . It is nevertheless a clear distinction, established by law, and it has been often asserted in this court that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue."

In Smelting Co. *vs.* Kemp, 104 U. S. 636, 641, after referring to the presumptions attending a patent of the United States for land, which are not open to rebuttal in actions at law between individuals, it is said:

> "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, *or if Congress had made no provision for their sale*, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind disclosing a want of jurisdiction may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal and goes to the existence of a *subject* upon which it was competent to act."

This is a direct proceeding by the United States for the vacation and annulment of the Kidwell patent, and, under

the principles above announced, *if it be found that the land office did not have jurisdiction of the subject matter because Congress had passed no law providing for the disposition of the land granted,* the patent must fail.

It will be observed that the joint resolution does not in terms make a new law nor does it manifest an intention to do more than to provide means and agencies for carrying into effect in the District of Columbia, laws of Maryland "for securing titles to vacant land" which were supposed to be in force in the District by virtue of the provisions of the Act of Congress of February 27, 1801.

We contend—

1. That lands of the State of the kind granted by this patent, that is, tide lands, were not subject to sale or disposition under laws in force in Maryland at the time of the cession by that State to the United States; and even if they were:

2. That the provision in the Act of Congress of February 27, 1801, continuing in force the laws of Maryland in the territory ceded by that State had relation only to the State laws affecting individuals and the property rights of individuals and had no relation whatever to the public property held by the State, the old sovereign, and which had been by it transferred to the new sovereign, the United States.

The nature of the State's title to tide and other lands within its borders has been considered in that portion of this brief (pp. 30–41) which treats of the pretensions of the heirs of James M. Marshall under the deed to them from the legal representative of the last Proprietary of Maryland; and it was there shown that since the Revolution and the passage of the Confiscation Acts the title of the State of Maryland to lands within its borders was traceable to two sources, viz.:

a. Its succession as sovereign to the *jura regalia* of the crown by which it became the owner of the beds and shores of tide or navigable waters. (Martin *vs.* Waddell.)

b. The Confiscation Acts by which the purely private property of Henry Harford, the last Proprietary under the charter, had become vested in it.

It was there further shown from the history of the administration of his land affairs by the Proprietary, and of the administration of the Land Office under the State government, down to the decision in Browne *vs.* Kennedy, in 1821, that lands under tidewater were not considered to be the subject of a patent from the Land Office, under the general laws, and that a private right of property in them could only be obtained, by specific *legislative* action.

Maryland Acts for Disposition of Vacant Lands did not Include Tide Lands.

The only acts of Maryland in force in that State on February 27, 1801, under which a disposition of the lands of the State could be made, are the acts of November session, 1781, chapter 20, and of November session, 1788, chapter 44; by these acts certain lands, specially designated, are appropriated for the benefit of Maryland's soldiers in the War of the Revolution, and provision is made for the disposal, in a certain manner and upon certain terms, of other "vacant lands" of the State with the expressed object of "promoting population;" in other words, of attracting settlers.

The Act of 1781, chapter 20, is the first, says Kilty (Land Holder's Assistant, p. 308) "that makes arrangements for disposing of the State's right to vacant land."

It is entitled—

> "An Act to appropriate certain lands to the use of the officers and soldiers of this State, *and for the sale of vacant lands;*"

and the preamble recites that there are large tracts of land within the State—

> "reserved by the late proprietors, which may be applied to the discharge of the engagement of lands made to the officers and soldiers of this State."

and that—

> "*the granting the other vacant lands in this State would promote population* and create a fund towards defraying the public burthen."

Section 3 provided for a land office at Annapolis, and that the register thereof should, on the titling of the treasurer of the State—

> "issue common or special warrants of *vacant cultivation*, and for the surveying of any vacant lands, cultivated or uncultivated,"

to be directed to the surveyor of the county where the land should lie, who should return his certificate of survey to the register, to be delivered by him to the Examiner General, who, in case it passed his examination, should deliver it into the Land Office, and that after payment of "the purchase or caution money" the register—

> "shall make out a grant and present the same to the chancellor for his approbation, and being attested by him and signed by the Governor for the time being, the seal of the State should be thereunto affixed."

Section 4 provides that the Treasurer may grant orders or titlings to the Register—

> "for *common warrants* to take up *vacant uncultivated land*, or for *special warrants* to take up *cultivated or improved vacant land*, on the payment of three shillings six-pence current money per acre,"

and further provided that the person returning a certificate of survey, under such warrant, should also pay the Treasurer within one year from the time of taking out such warrant, four shillings per acre, for every acre of vacancy included in such certificate.

> "So that seven shillings and six-pence current money per acre be paid to the State for every acre of vacant

land in any manner granted under warrants hereafter to be taken out."

The use of the terms "*vacant uncultivated land*," and "*cultivated or improved vacant land*," and "*warrants of vacant cultivation*" would seem clearly enough to exclude the idea that in this legislation the disposition of land covered by tide water was contemplated.

Section 6 authorized the Governor and Council from time to time to make and establish rules and orders for the direction of the Treasurer in issuing titlings for warrants, and for the conduct of the Examiner General and the Register, and for the behavior of the surveyors. By Section 7 it was made the duty of the Examiner General to examine, pass or reject any certificate agreeably to former or future rules and directions as the case might be, and he was required to take an oath to the Government, and on oath "to execute his office diligently and faithfully without favor, affection, partiality or prejudice."

Kilty (L. H. A., p. 308) states that the true meaning of this act was that all lands westward of Fort Cumberland were appropriated to discharge the State's engagement to its officers and soldiers, and, that after it had been discharged, the "residue" of such lands were "to the use of the public."

However this may be, by the 13th section of the act of November Session, 1788, Ch. 44, all other "vacant land" in the State was made liable to be taken up in the usual manner by warrant, at the rate of three shillings and ninepence current money per acre, to be paid as required by the Act of 1781, Ch. 20.

The lands of the State, the disposition of which was contemplated by these acts, were evidently vacant lands which had either been cultivated or which were susceptible of cultivation; none other would "promote population."

> "By the common law both the title and dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark are in the King. Such waters and the lands which they cover, either at all times, or at least when the tide is in, *are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primary uses are public in their nature,* for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects."
>
> Shively *vs.* Bowlby, 152 U. S., 11.

But if the Acts of Maryland of 1781, Ch. 20, and 1788, Ch. 44, had provided simply for the disposition of "vacant land," without any qualification that it should be susceptible of cultivation, it is clear that lands of the nature of those in the grant to Kidwell could not be disposed of under them.

> "The rights of the crown in tide waters are classed among the *regalia* or prerogative rights like the right to treasure trove, to wrecks, and the privilege of appointing ports and havens, such privileges are accorded to the king by the common law as incident to the powers of government for the protection of the realm, the regulation of the marine revenues and in the interest of commerce."
>
> Gould on Waters, Sec. 17.

> "When the revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights surrendered by the Constitution to the general government."
>
> Martin *vs.* Waddell, 16 Pet. 367.

In regard to the title of the State to lands under navigable water, this court has said that it "is a title different in

character from that which the State holds in lands intended for sale," and is held for different purposes.

> Illinois Central RR. Co. *vs.* Illinois (Chicago Lake Front Case), 146 U. S. 452.

The doctrine of the Lake Front Case is, that the *jus priratum* of the King has become part of the *jus publicum* of the State, and that by reason of its peculiar nature, it is not competent for the State to provide for the sale and disposition of the latter kind of property, in the same manner as the former; that the soils and beds of navigable waters are held by the people "in trust for their common use and of common right as an incident to their sovereignty," and that they can only be disposed of by the State for the avowed purpose of conserving the rights of the public under the trust.

From the opinion of the court in that case it appears that the legislature of Illinois in 1869 passed an act declaring that—

> "all the right and title of the State of Illinois *in and to the submerged lands* constituting the bed of Lake Michigan,"

and lying for one mile east of the tracks and breakwater of the railroad—

> "are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns,"

with a proviso that the lands should be held in perpetuity by the company, which should not have the power to grant, sell or convey the same, and that nothing in the act contained should authorize obstructions to the harbor of Chicago or impair the public right of navigation, &c.; this act having been repealed the repeal was objected to by the company on Constitutional grounds.

The court says that the question to be considered is—

> "Whether the legislature was competent to thus deprive the State *of the ownership of the submerged lands in the harbor of Chicago and of the consequent control of its waters.*"

The conclusion reached by the court was against the power of the State to do so, and in considering the nature of the State's title in the particular kind of property it is said

> "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. *But it is a title different in character from that which the State holds in lands intended for sale.* It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances *by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands;* and, so long as their disposition is made for *such purpose*, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundations for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State"

and of the attempted alienation of the State's title the court says (p. 456):

> "Necessarily must the control of the waters of the State, over all lands under them, pass, when the lands are conveyed in fee to private parties and are by them subject to use."

The grant to Kidwell is even more objectionable and preposterous than that made to the railroad company by the State of Illinois, for the latter had the color of law to support it while the former had not; in respect of the evil attempted the difference is only in degree; what the court says (p. 453) in criticising the Illinois grant applies with equal if not greater force to the one made to Kidwell:

> "Such abdication is not consistent with the exercise of the trust which requires the government of the State to preserve such waters for the use of the public."

The term "*vacant lands*" and "*waste and unappropriated lands*" of the State used in State legislation mean in substance the same thing as the term "*public lands*" used in the legislation of Congress.

That these words, in the sense in which used in acts of Congress, do not include "*tide lands*" belonging to the public, has been expressly adjudicated by this Court.

> "It is settled that the general legislation of Congress in respect to *public lands* does not extend to *tide lands*. There is nothing in the act authorizing the Valentine scrip, or in the circumstances, which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, but the term 'public lands' does not include tide lands. As said in Newhall *vs.* Sanger, 92 U. S., 761, 763: 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. See also Leavenworth, &c., Railroad *vs.* United States, 92 U. S., 733; Doolan *vs.* Carr, 125 U. S., 618.'"
>
> Mann *vs.* Tacoma Land Co., 153 U. S. 284.

BROWNE VS. KENNEDY.

As the decision in Browne *vs.* Kennedy will also be relied on by the defendants claiming under the Kidwell patent, in

support of the grant, it is proper at this stage of the argument to consider more fully what weight should be given to it; we submit that it should not be regarded as an authoritative precedent, the law of the State, previous to its rendition, having been otherwise than therein declared.

Although the construction given in Baltimore *vs.* McKim, 3 Bl. 468–9, to the decision in Browne *vs.* Kennedy has been followed in Chapman *vs.* Hoskins 2 Md. Ch. 489, and other cases, in the courts of Maryland it seems to be not justified by the language of the judges who delivered opinions in the case. The case was decided in 1821; it was an ejectment suit in which the title of each party had its origin in a colonial grant, and not in any grant from the State.

The facts were that the lines of a tract called Todd's Range, granted in 1700 to one Todd, ran across Jones' Falls, a navigable tidal creek, and included the whole of the creek for a considerable distance; that title to the tract being vested in Charles Carroll, he conveyed in 1757, to one Lyon the portion of the tract binding on one side of the creek, and conveyed to one Lawson the portion of the tract binding on the other side of the creek; that in 1786, by the consent of the proprietors, a canal was cut and the stream diverted into a new channel; that Carroll's devisee, in 1795 conveyed to one Williams all of Todd's Range not previously conveyed; and the question was whether title to the old bed of the stream passed to Lyon and Lawson, or to Williams.

The case was argued before Chase, Ch. J., Buchanan, Earle, Johnson and Martin, JJ's; Chase, Ch. J., delivered an opinion; Buchanan, J., delivered one in which he arrived at the same conclusion as Chase, Ch. J., but on different grounds; Johnson and Martin, JJ., concurred with Buchanan, J.; and Earle, J., delivered a dissenting opinion maintaining that title was in the grantee of Williams.

The power of the State to grant tide lands was not involved in the case, and certainly not the power of the State Land Office under existing legislation to issue patents

for them; the latter was not discussed, suggested, or even hinted at.

Chase, Ch. J., held that the Proprietary had the power under the charter to grant such lands subject to the public rights, and that his grantee took *sub modo*; and that the State of Maryland—

> "is invested with all the rights within the boundaries of the charter as the King of England ever did or ever could enjoy."

Buchanan, J., held that the King could grant *sub modo*, and that under section 4 of the charter such lands passed to the Proprietary *sub modo*, and in the same manner passed by the Proprietary's grant; he held the title to public rivers be—

> "as much the the property of the State as public rivers in England are the public property of the King."

Earle, J., held that the right of property in navigable rivers was in the Proprietary "as being in the place of the King."

These opinions seem to do no more than affirm the right of the State to dispose *sub modo* of lands under tidewaters, which, if conceded, leads to the inquiry: Was there any law of the State making provision for it? We say that there was none; and that, if the true import of Browne *vs.* Kennedy be, as stated in Baltimore *vs.* McKim, a holding that the State Land Office, under the acts mentioned, had the right to entertain applications and to grant patents for tide lands, then, as we have shown, the decision was in controvention of the law of the colony and State and of the unbroken practice under it prior thereto.

See previous citations (pp. 44–48).

1. The Proprietary's Instructions of November 12, 1656, and his Instructions of December 5, 1768.

2. The Instructions of the Governor and Council of Maryland, of April 15, 1782.
3. Proprietary *vs.* Jennings, 1 H. & McH. 64–5, decided in 1733.
4. Smith and Purviances *vs.* State, 2 H. & McH. 247.
5. The certificate for the survey of Cerne Abbey Manor, in 1769, being a resurvey on older grants, and the patent issued on the resurvey, by which 115 acres contained in the original patents were excluded from the new one because they lay in navigable waters.
6. The certificate of resurvey for Boreing's Convenience and Bold Venture, dated June 30, 1759, and the patent thereon whereby 152¼ acres included in the earlier grants were excluded from the new one because found to lie in older surveys and navigable waters (Wilson *et al.*, *vs.* Inloes *et al.*, 6 Gill. 135–40); and the certificate of survey for Edward Fell, dated May 20, 1761, under the name of Fell's Prospect, and being a resurvey on Long Island Point and other earlier grants, amounting in the whole to 303 acres, 30 acres of which is excluded as lying in elder surveys and lost in navigable water (Casey *vs.* Inloes *et al.*, 1 Gill, 461, 462).
7. The case of Fowler *vs.* Goodwin, in which the Chancellor, on May 19, 1809, refused to pass through the Land Office a patent for a tract, because a large part of it lay on the waters of Bell's Cove; and the case of Ritchie *vs.* Sample in the Land Office, in which the Chancellor held, on July 10, 1816, that land covered by water could not be called grantable land, for which reason he refused to pass a patent for the land applied for; (foot-notes to Baltimore *vs.* McKim, 3 Bland, 468–9).

And certainly when the city of Washington was laid out it was not considered that a Maryland patent which included tide lands passed title to them.

Considerable quantities of the land conveyed by Daniel Carroll, one of the proprietors, in trust for the purposes of the city, were selected for the use of the Government, and differences arose between him and the Commissioners as to the areas to be paid for, interest, etc. A statement of Carroll's case was submitted by the Commissioners to Attorney General Lee for his opinion, one of the questions being whether Carroll was entitled to payment for the space included in a canal,—

> "either where it is navigable tide water and requires to be contracted or where it is dug, or intended to be dug for the purposes of navigation, including a street on each side for its use."
>
> Rec., Vol. 7, pp. 2255, 2257–8.

The Attorney General held that streets laid off by direction of the President were expressly excluded from calculation as property to be paid for, and that Mr. Carroll was not entitled to pay for those laid off along the canal, and he adds:

> "Nor is it reasonable that he should be paid for the bed of the canal, that being a navigable water by nature, free to the use of everybody for the purpose of navigation, in its natural state. . . . In strictness, the part of the canal above tide water is distinguishable from the residue."
>
> Rec., Vol. 7, p. 2259.

Carroll, having been furnished by the Commissioners with a copy of this opinion, replied under date of April 15, 1800:

> "If I am not mistaken, the opinion of the Attorney General certainly is that I should receive payment for that part of the canal above tide water; this is all I have ever expected to be paid for."

That the decision in Browne *vs.* Kennedy constituted, in the opinion of Chancellor Bland, a departure from the law as previously understood and applied, and inaugurated a new rule with respect to the power of the Land Office to entertain applications and to grant patents for land under tide water, is apparent, from his language in McKim *vs.* Baltimore, before quoted; Chancellor Johnson also considered it a departure, for he says, in Chapman *vs.* Hoskins, 2 Md. Ch. 489:—

> "*Since* the decision of the Court of Appeals of this State, in the case of Browne *vs.* Kennedy, 5 H. & J. 195, it appears to me quite impossible to deny that it is competent to the State to grant land covered by navigable waters, subject to the right of the public to fish in and navigate them,"

and the Court of Appeals itself, in the case of Wilson *vs.* Inloes, 11 G. & J. 352, say:

> "In the case of Browne *vs.* Kennedy, *this court established the principle* that the State had the right to grant the soil covered by navigable water, subject to the public or common right of navigation and fishery."

The *principle*, evidently, in the opinion of the court had not been established theretofore.

The grants under consideration in those cases were issued by the Land Office of the colony, or that of the State, long prior to the decision in Browne *vs.* Kennedy. The proposition "that the State had the right to grant the soil covered by navigable waters," subject to the public rights, may for the purposes of this argument be conceded, and it may be conceded that the Proprietary, by prerogative right, or as a matter of private right purely, during the colonial period might have done the same thing; the fact is, however, that the Proprietary never knowingly exercised the right and apparently never claimed it, as the history of the colonial period indicates that he considered that kind of

property as held in trust for the public and only to be disposed of through the action of the legislature; and when it was ascertained that such lands were in fact included within the land described in a patent, the grant upon the Proprietary's suit was subject to be vacated and annulled; and upon a resurvey such land was excluded from the new patent (Acts of 1699, 1745, the Regulations of the Proprietary and under the State, above cited, and the information filed by him in Proprietary *vs.* Jennings), although the grant on that account could not be collaterally attacked.

> "If by the grant fraud were practiced upon the Lord Proprietary, he only, or those subsequently claiming under him, have a right to complain."
>
> Wilson *vs.* Inloes, 6 Gill. 169, decided in 1847.

The Proprietary, under the charter, in such matters was the representative of the public.

When the State became sovereign there was no prerogative right, and such lands could only be disposed of through its legislation; the Acts of 1781 and of 1788, the only ones providing for the disposition of the "vacant land" of the State, did not, upon the conclusive authority of this court, and of the earlier Maryland decisions and practice, as we have seen, contemplate such disposition.

The prerogative right under which the Proprietary, in his day, might have disposed of such property, did not pass to any individual under the new State government. In fact, the people of the State emphatically provided in the 33d section of their first constitution that:

> "the Governor shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute, or custom of England or Great Britain."

They have by no act conferred in direct terms any such "power or prerogative" upon any other branch or agency of the State government, and under such circumstances it is not possible to conceive they intended that what was

denied to the chief organ of its executive branch should be possessed or exercised by the Land Office in disposing of the State's lands.

In this connection the case of State *vs.* Pacific Guano Co., 22 So. Car. 50, 75, 83, cited in Schively *vs.* Bowlby, is instructive. In that case the Attorney General of the State filed under a statute an information charging that the defendant had intruded upon certain property of the State, consisting of the beds of certain creeks, "all tide-waters;" and had taken from such beds large deposits of phosphatic rock; and claiming damages for the rock so removed, and for an injunction. The defendant was the owner of the fast land abutting these creeks. The court say:

> "The doctrines of the common law as to the seashore and the soil lying under tide waters and navigable streams were peculiar. The fundamental idea was that the property in the sea and tide waters, and in the soil and shore thereof, was in the sovereign. In the view that they partook somewhat of the nature of the sea, the fact alone, that the tide ebb and flowed in a stream, was considered proof of its navigability. Martin *vs.* Waddell, 16 Peters, 307; 3 Kent, 377. We know of no law or judicial decision which up to this time has changed that rule in this State. . . . By the common law, rivers are regarded as navigable only to such extent as the tide flows and ebbs; and the property in the beds of rivers, navigable in this sense, is undoubtedly in the State."

The defendant admitted the original title of the State, but could show no grant from it, and relied upon a presumption of such grant arising from long possession. The court calls attention to the peculiar rights to be taken from the State by such proposed presumption, saying:

> "The State had in the bed of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum*, consisting of the rights, powers and privileges derived from the British crown, and belonging to the governing head, which

she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the State, and in respect to which she had trust duties to perform. 3 Kent, 377; Martin *vs.* Waddell, 16 Peters, 367; Commonwealth *vs.* Roxbury, 9 Gray, 451. The absolute rule, heretofore referred to, limiting landowners bounded by such streams to high water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low water mark *are not held by the State simply as vacant lands, subject to grant to settlers in the usual way through the Land office.*

"There seems to be no doubt, however, that the State as such trustee has the power to dispose of these beds as she may think best for her citizens; *but not being, as it seems to us, subject to grant in the usual form under the provisions of the statute regulating vacant lands, it would seem to follow that in order to give effect to an alienation, which the State might undertake to make, it would be necessary to have a special act of the legislature expressing in terms and formally such intention.* . . . Under the proof in this case the court could not presume a special act of the legislature making the beds of these streams the property of private individuals."

The decision in Brown *vs.* Kennedy, as construed by the courts of Maryland, being in opposition to the law of the State as previously existing and recognized, and to the doctrine of Martin *vs.* Waddell, can not be accepted as a controlling authority in the determination of the case at bar. It clearly inaugurated a new rule and a new policy in the State, variant from and subversive of the one then existing, and which can not bind the United States.

The language of the Act of February 27, 1801, is—

"That the laws of the State of Maryland *as they now exist* shall be and continue in force in that part of the said District which was ceded by that State to the United States and by them accepted."

2 Stat. 103, Ch. 15, Sec. 1; Davis' Laws, 123.

Inquiry in this proceeding as to whether there then existed any law of the State which was continued in force in the District, and under which the issue of the Kidwell patent, a grant of tide lands, can be supported is not to be precluded by the decision in Browne *vs.* Kennedy.

In De Vaughn *vs.* Hutchinson, a case which arose in the District of Columbia and involved an application of the rule in Shelley's Case, it is said (165 U. S. 570):

> "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent alienation and transfer, and for the effect and construction of wills and other conveyances. . . . We have only to do with that famous rule *as expounded and applied by the courts of Maryland while the land in question formed part of the territory of that State* and to inquire further whether since the cession of the lands forming the District of Columbia there has been any change in the law by legislation of Congress."

After citing a number of Maryland decisions it is further said:

> "Though these decisions were made since the lands in question in this case became part of the District of Columbia, yet their reasoning is based upon the history of the law in Maryland ever since that State became independent, and we are therefore warranted in the conclusion that the law as laid down in the cited cases was the law when the State of Maryland ceded to the United States the territory now embraced in the city of Washington and District of Columbia, . . . nor do we find that there has been any attempt by the courts of the District to lay down a different rule."

In the reasoning of the court in Browne *vs.* Kennedy the "history of the law in Maryland," prior to the cession, is not given. We have shown what the history of that law is,

and it is apparent from that history that the decision is not only *not based upon it*, but is *in derogation of it.*

The Maryland laws continued in force in the District, related only to the persons and property rights of individuals, and not to the property of the State transferred by the cession.

The second ground of our contention is that the Maryland acts of 1781, Ch. 20, and of 1788, Ch. 44, providing for the sale of the "vacant lands" of the State, which became by the cession the property of the new sovereign, were not continued in force by the Act of Congress of February 27, 1801; and that the laws of Maryland, which *were* continued in force by that act were such *only* as related "to the persons and property of individuals."

The Constitution was established, according to its terms, June 21, 1788, nine States having then ratified it. The General Assembly of Maryland passed on December 23, 1788, (Davis' Laws, p. 59), an act entitled "An act to cede to Congress a district of ten miles square in this State," which authorized the representatives of the State in the Congress of the United States "appointed to assemble at New York on the first Wednesday of March next" to cede on behalf of the State—

> "any district in this State, not exceeding ten miles square, which the Congress may fix upon and accept for the seat of Government of the United States."

Congress by the act approved July 16, 1790, (Davis' Laws, p. 115), entitled "An act for establishing the temporary and permanent seat of the Government of the United States," accepted—

> "a district of territory, not exceeding ten miles square, to be located as hereafter directed on the River Potomac at some place between the mouths of the Eastern Branch and Connogocheague"

for such permanent seat. The act contained this proviso:

"*Provided, nevertheless,* That the operation of the laws of the State, within such district shall not be affected by this acceptance until the time fixed for the removal of the Government thereto, and until Congress shall otherwise by law provide."

By an amendment to this act, approved March 3, 1791 (Davis Laws, p. 116), it was provided that territory below the mouth of the Eastern Branch might be included in the District.

On December 19, 1791 (Davis' Laws, p. 64), the Maryland Assembly passed a further act entitled, "An act concerning the territory of Columbia and the City of Washington," which, after reciting the proclamations of the President declaring and making known the location of the ten miles square, and the conveyances made by the proprietors of lands therein to be laid out for a Federal city, etc., proceeds as follows:

"That many temporary provisions will be necessary till Congress exercise the jurisdiction and government over the said territory; and whereas, in the cession of this State heretofore made of territory for the Government of the United States, the lines of such cession could not be particularly designated; and it being expedient and proper that the same should be recognized in the acts of this State—

"2. Be it enacted by the General Assembly of Maryland, That all that part of the said territory, called Columbia, which lies within the limits of this State, shall be and the same *is hereby acknowledged to be forever ceded and relinquished to the Congress and Government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing, or to reside thereon,* pursuant to the tenor and effect of the eighth section of the first article of the Constitution of Government of the United States: *Provided,* that nothing herein contained shall be construed to vest in the United States any right of property in the soil, so as to affect the rights of individuals therein, otherwise

than the same shall or may be transferred by such individuals to the United States. And provided also, That the jurisdiction of the laws of this State, *over the persons and property of individuals* residing within the limits of the cession aforesaid, shall not cease or determine until Congress shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article of the Constitution before recited."

By the Act of Congress approved February 27, 1801 (Davis' Laws, p. 123), Congress assumed jurisdiction and established a court for the District of Columbia and provided for the appointment of a District attorney and other officers; said act contains this provision:

> "That the laws of the State of Maryland *as they now exist* shall be and continue in force in that part of the said district which was ceded by that State to the United States and by them accepted as aforesaid."

Speaking of the act of 1801, this court has said—

> "The language of the act is 'that the laws of the State of Maryland, *as they now exist*, shall be and *continue in force* in that part of the said district' which was ceded by that State to the United States and by them accepted. 2 Stat. 103, Ch. 15, Sec. 1.
>
> "A part of these laws was the common law, and two acts of Maryland, one passed in March, 1780, 'to declare and ascertain the privileges of the subjects of France' within that State; the other passed December 19, 1791, to ratify her cession to the United States, entitled, 'An act concerning the Territory of Columbia and the city of Washington.'"
>
> Geoffroy *vs.* Riggs, 133 U. S. 258, 265.

In the case of Van Ness *vs.* City of Washington and United States, 4 Pet. 232, 277, the court, referring to the acts of cession, say—

> "Suitable cessions of the jurisdiction and soil of

> the territory, *subject to the private rights of property of the inhabitants*, were made by the States of Maryland and Virginia."

On the transfer of territory by one sovereign to another—

> "the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State."
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> The American Ins. Co. *vs.* Canter, 1 Pet. 541.
> See also, U. S. *vs.* Perchman, 7 Pet. 51.
> Mitchell *vs.* U. S. 9 Pet. 732.
> Mitchell *vs.* Tucker, 10 Mo. 262.
> Leitensdorfer *vs.* Webb, 20 How. 176.
> Langdeau *vs.* Hanes, 21 Wall. 527.
> Chicago, etc. RR. Co. *vs.* McGlinn, 114 U. S. 542.
> Whart. Am. L., Sec. 154, cited in Southerland on Stat. Const., p. 19.

There is nothing in the acts of Congress, or of the State of Maryland, by which the status of the ceded territory as thus described was in any manner affected; in fact the principle is in terms affirmed in said acts.

Speaking of the effect of the Maryland act of cession and of the effect of a patent for land in the District of Columbia, which issued from the Maryland Land Office after the act had been passed, Mr. Justice Cox, in the opinion which has been heretofore referred to, delivered in the court below and adopted by this court (Shoemaker *vs.* U. S., 147 U. S. 314) says:

> "Now, this continues in force the jurisdiction of the laws of the State of Maryland over the persons and property of individuals residing therein. To make that applicable to the present case *it would be*

> *necessary to have extended it to the property held by the State*; but it seems to me that extended no further than to say *that the laws that affected private rights* should continue in force until proper provision was made by Congress. See what the consequences would be if another construction had been given to it. The State of Maryland extended to the Virginia shore, and suppose that after this cession, and before 1801, the State of Maryland had undertaken to cede to the State of Virginia the whole bed or bottom of the Potomac River, from its source to its mouth, including that part in the District of Columbia, doubtless Congress could have had something to say about it after the cession had been made. . . . . *We are satisfied that the proviso does not continue in operation the land laws of the State of Maryland as to the public lands owned by the State within the said District,*" etc.

No "acts of the State of Maryland for securing titles to vacant land" of the State whether tide or other land having been "continued in force by the Act of Congress of the 27th of February, 1801," in that part of the District ceded by that State, none could have been "inoperative for want of appropriate officers or authority in the said District for their due execution," and such nonexisting acts could not be "executed" under the joint resolution of 1839. As the resolution does not import the making of a new law any proceedings under it were nugatory and futile.

The passage of the resolution was based upon an erroneous legislative assumption as to the existing law; and the rule is that a statute which betrays an erroneous conception as to the proper interpretation of a pre-existing statute does not control the courts in their interpretation of such pre-existing statute. The power to interpret and construe is with the court and not with the legislature.

Postmaster General *vs.* Early, is a case in point;—

> "It is true that the language of the section indicates the opinion that jurisdiction existed in the

> circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature does not make law. But if this mistake is manifested in words, competent to make the law in the future, we know of no principle which can deny them this effect." 12 Wheat. 148.

The mistake is not manifested in such words in the Joint Resolution of 1839; that language simply evinces an intention on the part of Congress to carry into effect a law mistakenly supposed to be in existence; *non constat* that Congress intended without regard to existing laws to invest the General Land Office with power to dispose of and grant away the beds and shores of the Potomac and Eastern Branch rivers in the harbor of the city of Washington. In fact, the resolution upon its face excludes from the operation of the act any land which had been "*ceded to or acquired by the United States*" *for public purposes*, within which category the land granted by this patent seems clearly to fall.

In the case of South Ottawa *vs.* Perkins, 94 U. S. 269, 271, an act of the Legislature of Illinois, passed in 1857, which was a nullity under the constitution of the State, was held not to be validated by two subsequent acts passed in 1869, which recognized it as being a valid subsisting law. In respect of the first of the last mentioned acts, this court held that the legislature—

> "could at most give it vitality as a new act from the date of the act of 1869, but this it does not profess to do. . . . To give such a reference in a subsequent act as is here relied on the effect of validating or reviving or vitalizing a void or repealed statute *when no such intention is expressed*, would lay the foundation for evil practices. *The legislature might in this way be entrapped into the enactment or reenactment of laws when it had no intention or even suspicion that it was doing so.*"

The second act *was an act amendatory of the void act*, and as to it the court held:

> "The same observations apply to this act which have been made in regard to the act of March 27, 1869; *it does not profess to give any new force or validity* to the supposed act of 1857. . . . It takes for granted—mistakenly, as we have seen—that the act was duly passed and does nothing more."

This decision was followed in Post *vs.* Supervisors, 105 U. S. 668.

Judge Story has stated the following to be an excellent summary of the rules for construing statutes:

> "In some cases the letter of an act of Parliament is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law maker present; and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he being an upright and reasonable man would have given. If this be, that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto."
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> Rygate *vs.* Wardsboro, 30 Vt. 746.

> "The legislature have certainly no such authority over us as to change the laws of language. If given language does not express a given meaning, they may give us other language that does; but this will not change the meaning of the former language. In the very nature of language that is impossible. It is with, and by virtue of the new expressions, that that we get the new meaning; and the meaning of the law being the law itself, the law can be no older than the effectual expression of it."
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> Reiser *vs.* Savings Association, 39 Pa. St. 144.

The State of Maryland had title to two kinds of land within its borders; the upland was one kind, and the tide land was the other. If she held the tide land by virtue of her sovereignty, as decided in Martin *vs.* Waddell, the United States held it in the same capacity after the cession, and it was not such land under the authorities cited as was held for sale under general laws either of the State or of the United States. If, on the other hand the Proprietary of Maryland held tide land under the charter as his private property, and not as part of the *jura regalia*, and the State at the time of the cession held title simply by virtue of the Confiscation Acts, and such lands were liable under the general laws of the State, according to Browne *vs.* Kennedy, to be taken up by individuals through its land office as "vacant, uncultivated land," and passed to the United States in the same property right, then upon the cession to the United States the former liability of such land to be so taken up by and patented to individuals under the general laws of the State, ceased by the transfer of public property from one sovereign to the other.

In either view of the case, the assumption in the Joint Resolution of 1839, that any acts of Maryland for securing titles to vacant lands were continued in force, by the act of 1801 is clearly erroneous.

If tide lands were not subject to be patented under the acts of Maryland, or if, being so subject, the liability was destroyed by the act of cession, then, and in either case, there was no authority whatever in the General Land Office to entertain the application of Kidwell and to grant the patent thereon.

That it was well understood in the General Land Office at the time of the survey for Kidwell, that tide land was not subject to disposition under the resolution of Congress of 1839, is evident from the warrant of survey which directed the surveyor to survey and lay out the land for which Kidwell

had applied, provided he found the same to be "a firm land and not subject to tidal overflow."

This warrant shows that the law of the State, as it existed at the time of the cession, was the rule recognized in the General Land Office, and not that announced in Browne *vs.* Kennedy.

It also appears from the proceedings of the Land Office in similar cases, prior to the date of the Kidwell warrant. Commissioner Young, in a communication to the Secretary of the Treasury, dated September 24, 1847 (Rec., Vol. 7, p. 2454), in regard to an application of Conrad Faunce, for a warrant of survey for a tract "which is covered in part by the waters of the Potomac River during high tides," states that doubts have arisen in his mind—

> "whether these flats should be considered as land subject to survey and grant under the laws of Maryland, and whether it would be right and proper thus to make a grant in fee-simple to an individual which would authorize him to interfere with the bed of the river, which is in fact a public highway."

Commissioner Hendricks, under date of March 6, 1858 (Rec. Vol. 7, p. 2459), issued a warrant of survey in favor of James Towles, for twenty acres, which said Towles described in his application as an island in the Potomac; the warrant directed the surveyor to survey the land "provided it is a firm land and not subject to tidal overflow."

Commissioner Wilson, in a letter to John T. Given, dated November 8, 1866 (Rec., Vol. 7, p. 2457), in regard to the application of one Knight to rent certain flats skirting the Virginia channel, after referring to the authority vested in the office over vacant lands under the resolution of 1839, says:

> "The flats, however, do not stand in the relation of the vacant lands authorized to be surveyed and patented."

As early as September 5, 1795, William Thornton obtained from the Maryland Land Office a warrant of survey for about thirty acres,—

> "twenty acres thereof in an 'island or sand bar lying in Potomac river nearly opposite to the mouth of Goose Creek,'"

and ten acres in another—

> "island or sandbar lying in the Potomac river, etc.; on October 5, 1796, he obtained another warrant for the survey of two islands in the Potomac, and on October 3, 1797, and November 23, 1798, he obtained like warrants of survey for such islands."
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> Record, Vol. 7, pp. 2462–67.

Mr. Thornton never obtained patents on any of these warrants, presumably because the land claimed was subject to overflow by the tide; no other reason is apparent.

We respectfully submit that the reasons already advanced, and the authorities which have been cited, show conclusively, that the Kidwell patent is what at the outset it was asserted to be, an absolute nullity, and hence that it can be the source of no title whatsoever; and although the discussion as to its validity might well stop here, it may be added that even under the Resolution of 1839 the patent is also void, for two other reasons set forth in the bill, one of them being that the land granted was *within the limits of the city of Washington*, or was otherwise land "*ceded to and acquired by the United States for public purposes*;" such land being expressly excepted from the operation of the resolution, and still another being that the patent was obtained by fraud.

Both propositions are amply sustained by the testimony.

The land granted had been ceded to and acquired by the United States for public purposes and was so recognized by Congress.

By the very terms of the joint resolution lands "ceded to or acquired by the United States for public purposes" are

excluded from its operation; the use of the word "ceded" is significant. It could have reference only to lands acquired by the United States "for public purposes" through the acts of cession of the States. The land granted by the patent was impressed with this character in the hands of the State of Maryland, and in the hands of the United States it continued to be impressed with it.

That Congress considered the bed and shores of the Potomac River to be held for public purposes is shown by many of the steps and proceedings taken by each House of Congress separately and jointly.

From the beginning of the century the efforts of Congress have been directed to the improvement of that part of the Potomac River within the District of Columbia. Their attention had been engaged by the shifting and filling up of the channel, the growth of the flats and the increasing obstacles to the navigation of the river.

As early as May, 1812, in the first session of the Twelfth Congress, a bill had passed the Senate and was pending before the House "for improving the navigation of the river Potomac opposite the city of Washington." Executive Document No. 174.

Under a resolution of the House of Representatives, second session, thirtieth Congress, of the 8th of August, 1848, the Secretary of War was required—

> "to have a survey and examination made of that part of the Potomac River between the Long Bridge and Georgetown, with a view to ascertain the course of the formation of land on the flats along the banks of the river."

The report of the Chief of Engineers was transmitted to the House of Representatives in February, 1849. Executive Document No. 69.

Under a resolution of the Senate of the 17th of March, 1856, first session, Thirty-fourth Congress, requesting—

> "any information that the Topographical Bureau may afford concerning obstructions to the navigation of the Potomac River, within the District of Columbia, and the expediency of measures for removing the same,"

a report from the Engineer Department was transmitted by the Secretary of War. Executive Document No. 52.

Under a resolution of the Senate of the 14th of January, 1858, first session, Thirty-fifth Congress, calling upon the Secretary of War—

> "to transmit to the Senate any surveys or examination of the Potomac River in the vicinity of Washington City, made by any officer of the Topographical Bureau during the last year,"

a report of Captain Woodruff, accompanied by a chart of the surveys, was sent to the Senate. Executive Document No. 34.

By section 4 of an act of Congress of March 2, 1867 (14 Stats. 422), the Secretary of War was directed to cause examination and surveys to be made of the Potomac River in the District of Columbia and of other waters; the object of such examination and surveys, as stated in Section 1, being to enable him—

> "to determine what improvements thereof are required to render them safe and convenient for the navigation of the naval and commercial vessels of the United States, and the costs of such improvements."

Such examination and survey was made by General Michler, of the Corps of Engineers of the United States Army, who states the difficulties and suggests the remedies; he recommends excavation from the eastern draw of the Long Bridge to Easby's wharf, the length of which will be about

5,700 feet, and the quantity of soil to be removed about 162,621 cubic yards, and he adds:

> "The material removed can be conveniently deposited on the grassy marsh between the edge of the channel and the river shore, thereby embanking and reclaiming about 260 acres, the greater part of which would prove an extension to that part of the public grounds called the Mall."

In this report, which is dated April 30, 1868, General Michler further states that:

> "The old swash or shore channel has entirely disappeared; scarcely a foot of water over the flats upon the ebb tide; so also with the one known as the Washington or City Channel, the upper portion of which is closed to navigation, the present head being about midway between the north draw of the Bridge and the Washington Monument, and even at that point scarce seven feet of water can be depended upon; only very light draught boats, chiefly used for transporation of wood and lumber, pass through the drawer of this channel to the entrance of the Washington Canal, and then only in a high stage of water." Executive Document No. 292.

The Kidwell Meadows so called are located somewhere off the portion of the old Washington City Channel which General Michler says was closed at the date of his report.

The suggestions made in this and in other later reports led to the large and valuable improvements which have been carried on in the construction of the channel and the reclamation of the flats to the present time.

It will be observed that the act of Congress directing the examination and survey was approved *March 2, 1867*; the first application of Mr. Kidwell bears date *June 10, 1867*, the second bears date *September 2, 1867*; the warrants of survey are dated *June 26 and September 12, 1867*; all intermediate the date of the act of Congress and the report of General Michler; and while the very subject matter of the letters patent subsequently issued to Kidwell was under the consideration of Congress.

The Land Granted was Within the City Limits in 1869.

The limits of the city of Washington have never been specifically defined by any Act of Congress, and in order to determine where they are, the exigency of national politics which led to the establishment of the seat of Government of the United States on the Potomac, the constitutional provision for the permanent seat of Government, the acts of Congress, and of the legislature of Maryland, the conveyances of the proprietors who transferred their lands in aid of the accomplishment of the purpose intended, and the acts and proceedings of those upon whom the duty devolved of providing buildings for the public use, must be considered.

The establishment of the seat of Government on the farms of the Potomac was in furtherance of a great public purpose; it was, for reasons which are obvious, of the highest concern to the whole people of the United States, and it necessarily involved the founding of a city. The history of the times shows that the latter result was regarded by every one as inevitable, and that before its site was actually fixed upon, and while the President was at liberty to choose any location for it between the mouths of the Eastern branch and of the Conogocheague, there was much rivalry between persons interested in particular sites between those points in effort to secure its location.

The Act of Congress of July 16, 1790, "for establishing the temporary and permanent Seat of the Government of the United States," accepted a district not exceeding ten miles square, to be located on the river Potomac, between the mouths of two of its affluents, viz: the Eastern branch and the Conogocheague, and authorized the President to appoint three commissioners and to keep that number in appointment as long as might be necessary; it directed that said commissioners should, "under the direction of the President," survey and by proper metes and bounds define and limit a district of territory under the limitations above mentioned which when "so defined, limited, and located," should—

"be deemed the district accepted by this act for the permanent seat of the Government of the United States."

Section 3 of the act is as follows:

"The said Commissioners, or any two of them, shall have power *to purchase or accept* such quantity of land on the eastern side of the said river within the said District as the President shall deem proper for the use of the United States; and, according to such plans as the President shall approve, the said Commissioners, or any two of them, shall prior to the first Monday in December in the year one thousand eight hundred *provide suitable buildings* for the accommodation of Congress and of the President and for the public offices of the Government of the United States."

After the passage of the Act of 1790, Robert Peter and other proprietors of lands in Georgetown and its vicinity signed a paper dated October 13, 1790, and intended for the President, by which they bound themselves—

"to sell and make over by sufficient deeds in any manner which shall be directed by General Washington, or any person acting under him, and on such terms as he shall determine to be reasonable and just, any of the lands which we possess in the vicinity of Georgetown for the use of the Federal city."

In regard to the advantages of the locality as the site of the proposed city they say:

"In point of the healthiness of situation, goodness of water and air, considerations of so much weight, there are few spots in the United States which can boast any advantages over the one now in contemplation; and it is conceived that the hilliness of the country, far from being an objection, will be thought a desirable circumstance, as it will at once contribute to the beauty, health, and security of a city intended for the seat of Empire."

Rec., p. 2159, Vol. 7.

They consider in the paper the harbor facilities of the location generally and state that—

> "Undoubtedly the lower part of Mason's Island can be made a place of security for any number of ships that may winter here—and even if this was not the case, the Eastern branch would afford the utmost safety, and would be found no inconvenient place for the Merchants in the Federal City to lay up their ships."

The President, by proclamation dated January 24, 1791, directed that four lines of experiment, each ten miles in length, should be run, beginning at Hunting Creek near Alexandria, and so as to include land on both sides of the river; and he declared and made known that all that portion of territory within the four lines of experiment which should be within the State of Maryland and above the Eastern branch, and all that part within said lines of experiment which should be in the State of Virginia, and above a line to be run from the upper cape of the mouth of the Eastern branch, due southwest, and no more, should be fixed and surveyed, defined, limited and located "for a *part* of the said District accepted by the said Act of Congress.

Rec., p. 2165–6, Vol. 7.

In a letter dated the same day he says, in reference to the proclamation:

> "I have not by this first Act given to the said territory the whole extent of which it is susceptible in the direction of the river, because I thought it important that Congress should have an opportunity of considering whether by an amendatory law they would authorize the location of the residue at the lower end of the present location so as to comprehend the Eastern Branch itself and some of the country on its lower side in the State of Maryland and the town of Alexandria in Virginia."

Rec., p. 2167, Vol. 7.

By an act passed March 3, 1791, Congress repealed the requirement in the Act of July 16, 1790, that the whole of the proposed District should be located above the mouth of the Eastern branch, and gave permission for an extension below it. Thereupon, and on March 30, 1791, the President issued another proclamation—

> "for the purpose of amending and completing the location of the whole of the said territory of ten miles square,"

by which the lines of the District were defined as they existed at the time of the retrocession to the State of Virginia of the portion of the District ceded by her, and as they exist to-day on this side of the river.

Rec., p. 2173, Vol. 7.

The growth and development of a city, as a necessary incident to the erection of such buildings, must have been contemplated by Congress when the act of 1790 was passed; and although the act did not in terms authorize the President and the Commissioners to lay out a city, they evidently considered that the authority to do so was to be implied from it. Mr. Jefferson, then Secretary of State, expressed himself on this subject as follows:

> "The portion 'such quantity of land as the President shall deem *proper for the U. S.*' is vague. It may, therefore, be extended to the acceptance or purchase of land enough for the town; and I have no doubt it is the wish and perhaps expectation, in that case it will be laid out in lots and streets."
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> Record, p. 2155, Vol. 7.

He also observed—

> "it seems essential that the District should comprehend the water adjoining the establishment, and eligible that it should comprehend the opposite shore,"

and that—

> "the District being defined and the requisite quantity of ground secured, the next step must be to fix

the site for the public buildings—and to provide for the establishment or enlargement of a town within the district—as no special authority is given for the latter purpose, the consent of the proprietors will be necessary."

In view of the imposition upon the President and the Commissioners of duties by the act, the performance of which would of necessity involve large outlays of money, and that the act made no appropriation of the public money which would be available for the purpose, and in view of the further fact that by the act the burden was placed upon the President of obtaining by voluntary grant the funds necessary "for defraying the expense of such purchases and buildings," it must be conceded that it was intended by the act to confer upon him the largest discretionary power as to the method which it might be proper to pursue in obtaining such funds.

The President and the Commissioners, who were about to attempt the acquisition of land and the erection of buildings for the government without aid from the Federal Treasury, wisely concluded that the situation should be subordinated, so far as was practicable, to the pecuniary advantage of the Government, and that by so doing and by keeping otherwise, by private convention, within their control, so far as was practicable, the affairs of the city, the objects of the act of 1790 would be best subserved.

With these considerations in view President Washington entered into negotiations with the proprietors of the lands bordering upon the Potomac River and the Eastern Branch which were subsequently included within the limits of the city.

It was the original intention of the President to purchase for the United States all the land of private persons to be included within the site of the city, the purchase money evidently to be paid out of sales of lots when the city should be laid out. Under date of Philadelphia, February 3, 1791,

he addressed a letter to Messrs. Deakins and Stoddert of Georgetown in which he requested them to endeavor to purchase, for the public, certain parcels of land which he described, saying—

> "a clear purchase is so preferable to every other arrangement that I should scarcely think any other worthy of attention."
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> Rec., p. 2167, 2168, Vol. 7.

It also appears from this letter that at this time he had in mind three separate sites for the proposed city, all of which were included in the city as ultimately laid out. He was unable to make an outright purchase of the lands; and the negotiations finally resulted in an agreement signed by the proprietors of the lands dated March 13, 1791, by which they bound themselves to convey in trust their lands to be included within the lines of the Federal city.

Rec., p. 2183, 2184, Vol. 7.

The President, in a letter to Mr. Jefferson, from Mount Vernon, dated March 31, 1791, says that he has been so fortunate as to reconcile certain contending interests—

> "and to unite them in such an agreement as permits the *public purposes* to be carried into effect on an extensive and proper scale,"

and that by the agreement—

> "from 3000 to 5000 acres is to be ceded to the public on condition that when the whole shall be surveyed and laid off as a city (which Major L'Enfant is now directed to do), the present proprietors shall retain *every other lot*—and for such part of the land as may be taken for public use for squares, walks, etc., they shall be allowed at the rate of twenty-five pounds per acre."

The execution of deeds of their lands by the proprietors to Beall and Gantt, in trust, followed. These deeds were in the same form in every respect, with one exception, in an

immaterial particular, and are dated in 1791. Copies of them will be found in the Record, Vol. 5, p. 20.

Under the constitutional provision for the permanent seat of the Government, and the Act of Congress of July 16, 1790, and by the Maryland act of cession of December, 1791, and by these deeds, and other deeds to which the proprietors of lots in two subdivisions, Hamburg and Carrollsburg, which were included in the land selected for the city, were parties, and by certain legislation of Maryland, by which the interest of minors, persons *non compos*, etc., were subjected to the trusts declared in said deeds, the land to the shore and thence to the main channel of the river became available for the public purposes in view.

And it is by these deeds from individuals, by the legislation of Maryland, and of the United States above referred to, and by the subsequent acts of the public authorities, all intended to advance a great public purpose, that of founding and establishing a city for the Federal capital, that the limits of the city are to be determined; these sources of authority we contend, on behalf of the complainants, clearly establish such limits in the absence of specific legislative definition, as including the Potomac, or as extending at least to the Virginia or Georgetown channel.

That the President intended the city should at least extend to the *channels* of the Potomac and the Eastern branch on its water side is evident from his letter to Major L'Enfant, dated at Mount Vernon, April 4, 1791, (Record, Vol. 7, p. 2178) in which he says that the lands which, in his opinion, appear well adapted to the general design—

> "are those between Rock Creek, Potomac River and the Eastern Branch, *and as far up the latter as the turn of the channel above Evan's Point.*"

It is also evident from the form of description of the lands, adopted by him, and used in the trust deeds from the proprietors; the deeds (Record, Vol. 5, p. 20) granted all their lands lying and being within certain limits, bound-

aries and lines beginning on the east side of Rock Creek, and following the present outlines of the city on the north and east—

> "to the Eastern Branch; *thence by and with the waters of the Eastern Branch, Potomac River and Rock Creek* to the beginning,"

upon the special trust, that said lands, or such part thereof as may be thought necessary or proper, be laid out together with other lands, within the said limits, for a Federal city with such streets, squares, parcels and lots, as the President of the United States for the time being, shall approve; and that the grantees, Beall and Gantt, or the survivor of them, or the heirs of such survivor, should convey to the Commissioners, appointed by virtue of the Act of Congress of July 16, 1790, and their successors, for the use of the United States forever, all the said streets and such of the said squares, parcels and lots, as the President shall deem proper, for theuse of the United States, and that "as to the residue of said lots into which the said lands" shall have been laid off and divided, "a fair and equal division of them shall be made" between the proprietors and the Commissioners, etc.

Of these trust deeds it was said by this court in Van Ness *vs.* City of Washington and United States, 4 Pet., p. 280:

> "It is not very material, in our opinion, to decide what was the technical character of the grants made to the government; whether they are to deemed mere donations or purchases, *the grants were made for the foundation of a Federal city; and the public faith was necessarily pledged, when the grants were accepted, to found such city.*"

Elsewhere in the opinion (p. 281–2), it is further said:

> "They [the grantors in the deeds] might, and inded must, also have placed a just confidence in the Government that in founding the city, it would do no act which would obstruct its prosperity, or inter-

> fere with its great fundamental objects or interests. It could never be supposed that Congress would seek to destroy *what its own legislation had created and fostered into being.*"

The acts and proceedings of the President and of the Commissioners under the act of 1790, in entering into the arrangement indicated in the deeds of trust, and founding the city, were recognized and confirmed by subsequent legislation of Congress. Such was the effect of the act approved May 6, 1796, (Davis Laws, 117), entitled—

> "an Act authorizing a loan *for the use of the City of Washington*, in the District of Columbia, and for other purposes therein mentioned."

By this act the Commissioners were authorized "under the direction of the President of the United States" to borrow from time to time not exceeding $300,000, and pledging for the repayment thereof—

> "all the lots . . . vested in the Commissioners, or in trustees in any manner, for the use of the United States, now holden and remaining unsold."

The act provides that—

> "to the end that the same may be fully and punctually repaid, the said lots, or so many of them as shall be necessary, *shall be sold* and conveyed, at such times and in such manner as the President of the United States for the time being shall direct; and the money arising from the said sales shall be applied and appropriated, under his direction, to the discharge of the said loans, after first paying the original proprietors any balances due to them respectively, according to their several conveyances to the said Commissioners or trustees;"

and that the United States shall be liable only for any balance that may remain unsatisfied from such sales, etc. See, also, the act supplementary thereto approved April 18,

1798 (Davis' Laws, 118), and Sec. 4 of the act approved April 24, 1800 (Davis' Laws, 119–120).

In the act of Maryland, passed December 19, 1791 (Davis, Laws, p. 64), the President's proclamation defining the bounds of the District, and the conveyances by the proprietors are recited, and the Commissioners are given power—

> "to license the building of wharves in the waters of Potomac and the Eastern Branch adjoining the city, of the materials, in the manner and the extent they may judge durable, convenient, and agreeing with general order . . . they may also, from time to time, make regulations for the discharge and laying of ballast from ships or vessels lying in Potomac River . . . and from ships and vessels lying in the Eastern Branch."

The documentary evidence in the case shows that under the direction of the President, surveys were made, and a plan of a city prepared by P. C. L'Enfant to be laid out on the lands thus conveyed, a copy of which will be found in Vol. 6 of the Record between pages 352 and 353; and that the first sale of lots in the city was made according to this plan on October 17, 1792 (Record, Vol. 7, pp. 2192, 2193); that owing to friction between him and the Commissioners, his employment was terminated, and he left the District, taking his plan with him; that then Andrew Ellicott, by whom the lines of the District had been surveyed, and who had assisted L'Enfant in surveys within the city, prepared a plan, by the direction of the President, which has since been known as the Engraved Plan or Ellicott Plan, a copy of which will also be found in Vol. 5 of the Record between pages 76 and 77. This plan was circulated throughout the United States and abroad as the plan of the city, and it was the "general rule" of the Commissioners in their transactions. The Dermott Plan of 1797 had a special office, as did the King Plan of 1803,

which will hereafter appear, but the Engraved Plan never lost its distinctive character as THE PLAN of the city; the one which was to be "stable and unalterable," engraved—

> "by order of the President and declared by his successive acts to be the plan of the city, which he would not depart from in any instance where it could be avoided."

All subsequent ones simply illustrated the progress made from time to time in the attempt to lay it down upon the ground.

These events and facts are indicated by extracts taken from the following documents:

The L'Enfant Plan.

Letter from the President to Humphreys, July 20, 1791 (Rec., Vol. 7, p. 2193):

> "You have been informed of the spot fixed on for the seat of Government on the Potomac; and I am now happy to add . . . that the business of laying out the city, the grounds for public buildings, walks, etc., is advancing under the inspection of Major L'Enfant, with pleasing prospects. . . ."

Letter from Secretary of State to the Commissioners, August 28, 1791 (Ib. p. 2200):

> "Major L'Enfant having also arrived here (Philadelphia) and laid the plan of the federal city before the President, he was pleased to desire a conference of certain persons in his presence on these several subjects."

Letter from Commissioners to Major L'Enfant, September 9, 1791 (Ib. p. 2202):

> "We have agreed that the Federal District shall be called 'The Territory of Columbia,' and the Federal City 'The City of Washington;' the title of the map will therefore be 'A Map of the city of Washington in the Territory of Columbia.'

"We have also agreed the streets be named alphabetically one way, and numerically the other; the former divided into North and South letters, the latter into East and West numbers from the Capitol. Major Ellicott, with proper assistants, will immediately take and soon furnish you with soundings of the Western Branch to be inserted in the map."

President's directions for sale of lots, October 17, 1791 (Rec., Vol. 7, p. 2203):

"The President of the U. States doth hereby order and direct that the sale of lots in the city of Washington, to commence this day, be of such lots as the Commissioners or any two of them shall think proper," etc.

Letter from President to Stuart, November 20, 1791 (Ib. page 2204):

"I had heard before the receipt of your letter of the 29th of October—and with a degree of surprise and concern not easy to be expressed—that Major L'Enfant had refused the map of the Federal city when it was requested by the Commissioners for the satisfaction of the purchasers at the sale. . . . But I did not expect to have met with such perverseness in Major L'Enfant as his late conduct exhibited."

Communication of President to Congress, December 13, 1791 (Ib., p. 2208):

"I place before you the plan of the city that has been laid out within the district of ten miles square, which was fixed upon for the permanent seat of the government of the United States."

The Ellicott or Engraved Plan.

Letter from Andrew Ellicott to the Commissioners, February 29th, 1792 (Ib., p. 2208):

"On my arrival at this city (Philadelphia) I found that no preparation was made for an engraving of the plan of the City of Washington. Upon this representation being made to the President and Secretary of State I was directed to furnish one for an engraver; which, with the aid of my brother, was completed last month and handed to the President. In this business we met with difficulties of a very serious nature. Major L'Enfant refused us the use of the Original. . . . I have engaged two good artists (both Americans) to execute the engraving, and who will begin the work as soon as the President comes to a determination respecting some small alterations."

Letter from President to the Commissioners, March 6, 1792 (Ib., p. 22, 10–11):

"Matters are at length brought to a close with Major L'Enfant. . . . Upon Major L'Enfant's arrival here in the latter part of December, I pressed him in the most earnest manner to get the plan ready for engraving as soon as possible. Finding there was no prospect of obtaining it through him (at least not in any definite time) the matter was put into Mr. Ellicott's hands to prepare about 3 weeks ago. He has prepared it, but the engravers who have undertaken to execute it, say it can not certainly be done in less than two—perhaps not under 3 months."

Letter from Andrew Ellicott to Commissioners, March 7, 1792 (Ib., p. 2211):

"In consequence of Major L'Enfant withdrawing himself from the business as soon as he arrived in this place (Philadelphia) we have been constantly employed in drawing a correct plan of the city and copying it for the engraver, and had we but have joined with him in withholding materials, the whole expense of last summer would have probably been thrown away."

Letter from Commissioners to Andrew Ellicott, March 14, 1792 (Rec., Vol. 7, p. 2213):

"We are happy to hear you have been able to get the plan ready for engraving notwithstanding the want of Major L'Enfant's assistance."

Letter from the Secretary of State to Commissioners, April 20, 1792 (Ib. 2213):

"Your favor of the 11th, has been duly received and laid before the President. He thinks it best to decline making any alterations on the Plan of the City. The considerations which weigh with him are the expediency of fixing the Public opinion on the thing as Stable and unalterable."

Letter from Thackara and Vallance (engravers) to Andrew Ellicott, October 16, 1792 (Ib., p. 2217):

"The plan of the city of Washington we completed the beginning of last week, since which time we have been looking out for an opportunity of conveying a proof to you but can meet with none which alone is the reason we did not give you earlier information."

Letter from Commissioners to Taylor, Chief Clerk State Department, November 6, 1792 (Ib., p. 2220):

"We received yours of the 28th ult. last evening too late to be answered, and just as we were sending one for Mr. Jefferson to the Office. As the Plates executed in Philadelphia will be most correct, we have had many applications from people in this place and Neighborhood for them, as they are anxious to send them to their correspondents in Europe."

Samuel Hill, a Boston engraver, had also been furnished by Mr. Ellicott with a draught of a plan; the engraving of Mr. Hill lacked the soundings of the Potomac and Eastern Branch rivers, and differed in other features from the Philadelphia engraving. A copy of the Boston engraving will be found in Vol. 5, between pages 120 and 121 (Stewart's Depn., Rec., Vol. 2, p. 673; Vol. 4, p. 1566).

Letter from Fenwick to the Commissioners, dated Bordeaux, April 4, 1793 (Ib., p. 2224):

> "I have the honor of your favors of the 4 and 7th Jan'y past, covering one for the municipal officers of Bordeaux and several plans of the City of Washington."

Letter from Commissioners to the President, January 2, 1797 (Ib., page 2238):

> "It is by no means our wish that any alteration should be made in the published plan of the City. It may, with great truth, be asserted that every change occasions infinite trouble to the Commissioners and Board."

Letter from Commissioners to Davidson, February 2, 1797 (Ib., page 2239):

> "We shall by next post forward to the President of the United States an Instrument of writing for his execution, if it meets with his approbation, by which the public appropriations will be finally determined. . . . *The engraved plan has been the general rule in our transactions, heretofore, agreeably to which we shall form the instrument intended for the President's signature.*"

Letter from President to Commissioners, February 20, 1797 (Ib., page 2240):

> "Reasons, which I have frequently assigned, have prevented me from acknowledging sooner the receipt of your letter of the 3rd instant relative to the Memorial of Mr. Davidson. Indeed I have so often expressed my unwillingness to depart from the engraved plan, in every instance where it could be avoided, that I had hoped no repetition of this sort would have been made to you by any of the Proprietors. . . . To this summary may be added, that Mr. Davidson is mistaken if he supposes that the transmission of Major L'Enfant's plan of the City to Congress was the completion thereof. So far from it, it will appear by the message which accompanied

> the same that it was given as matter of information, to shew what state the business was in, and the return of it requested; that neither House of Congress passed any act consequent thereupon: that it remained as before under the control of the Executive; that afterwards several errors were discovered and corrected; many alterations made and the appropriations (except as to the Capitol and President's house) struck out under that authority before it was sent to the engraver, *intending that work and the promulgation thereof were to give it the final and regulating stamp.*"

The L'Enfant Plan provided for a circular street in front of the President's Square; the Ellicott or Engraved Plan changed this and appropriated to the public the ground included in Jackson Square, thereby excluding squares shown on the L'Enfant Plan, which would have been liable to division between Davidson and the public; to this Davidson objected.

Letter from the Commissioners to the President, February 27, 1797 (Ib., p. 2242):

> "Mr. Davidson will be taken up as soon as we have a full Board, which will be the last of this or the beginning of next week. What Mr. Davidson alludes to in his memorial where he says deviations have been made since the publication of the Engraved Plan, we know not. *That plan required the doing of many acts to carry it into effect; such as the laying out and bounding a water street on the waters which surround the city* and laying out squares, where vacant spaces unappropriated were left in several parts of this city."

Letter from General Washington to Commissioner Thornton, June 1, 1799 (Record, Vol. 6, p. 339):

> "But as you have requested that I would give you my ideas on a certain point which seems to have occupied the attention of the Board of Commissioners, and on which I presume my letters to that body

> (whilst I had the honor to administer the government) have not been so clear and explicit as it was my intention to be, I have no hesitation in declaring (unless I have entirely forgotten all recollection of the fact) that it has always been my invariable opinion, and still remains to be so, *that no departure from the engraved plan of the city ought to be allowed*, unless imperious necessity should require it, or some great public good to be promoted thereby.
>
> "Minor considerations contribute to this opinion, but the primary, and to my mind an unanswerable one, is, that after the general plan (with some alterations) had been adopted, ordered to be engraved and published, and was transmitted to several if not to all our public agents abroad, for the purpose of inviting purchasers, it would, for reasons too obvious and cogent to require illustration, be deceptious to lay off lots for private purposes, where none appear in a plan which was intended to inform, aid, and direct the judgment of foreigners and others who could not on the premises make a choice."

The letter last mentioned was in reply to one of Commissioner Thornton, dated May 31, 1799 (Rec., Vol. 7, p. 2263), in which he stated that the Board of Commissioners "were exceedingly urged" by George Walker to lay off and divide certain small portions of ground at the intersection of various avenues and streets "which do not appear to have ever been designed for private occupancy;" and that, perceiving the board was disposed to adopt the proposal, he declared the measure contrary to the intention of the late President, and requested the board not to sanction it until the opinion of the late President should be known; if they had any doubt as to what it was under his letter of December 26, 1796. With his letter Mr. Thornton sent a copy of the protest made by him; in the protest Mr. Thornton declares that the disposition of the board—

> "to lay off several small squares, some of which do not contain one lot and a half, by which the intention of the late President in keeping open the junction

> of large avenues will be contravened, William Thornton moves (before they decide upon a measure which may, and he believes will, materially injure the general plan of the city and establish a principle which, by extending to every other similarly situated space, may do essential injury to individuals who have purchased under an impression that such spaces were meant to be left open) that the board postpone their decision till the opinion of the President of the United States can be obtained, whether it will be proper to lay out these small triangles into building lots, or, by declaring them public appropriations, shall direct payment for the same."

President Washington, in his letter to the Commissioners of December 26, 1796 (Rec., Vol. 7, p. 2237), had said:

> "With respect to the claims of individual proprietors to be compensated for the spaces occasioned by the intersection of streets and avenues, I should conceive that they might, with equal propriety, ask payment for the streets themselves; but the terms of the original contract or cession, if a dispute on this point should arise, must be recurred to, for I presume the opinion of the President, in such a case, would avail nothing. But if angles are taken off at the spaces, the case is materially altered; and, without designing it, you make a square where none was contemplated, and thereby not only lay the foundation of claim for those angles, but for the space also which is made a square by that act. I have never yet met with a single instance where it has been proposed to depart from the published plan of the city that an inconvenience or dispute of some sort has not sooner or later occurred; for which reason I am persuaded there should be no departure from it but in cases of necessity or from obvious utility."

The Commissioners finally yielded to the importunities of the proprietors and caused triangular squares to be laid out on the spaces at the intersections of streets and avenues shown on the Engraved Plan, and divided such squares

with said proprietors. In this way many new squares not shown on the Engraved Plan were added to the city, which were distinguished as "Square North of Square ," "Square South of Square ," "Square East of Square ," Square West of Square ." The squares so added appeared for the first time in the plan of the city which became known variously as the "Dermott Map," the "Appropriations Map," and the "Tin Case Map."

Letter from President Adams to Secretary of State, June 19, 1799 (Rec., Vol. 7, p. 2265):

> "My inclination and judgment, so far as I understand the subject, are with General Washington and Mr. Thornton."

Letter from Commissioners to President of the Senate and Speaker of the House, December 8, 1800 (Ib., 2268):

> "We do ourselves the honor of forwarding a plan of the city for each member of your House, which we beg the favor of you to direct the Doorkeeper to deliver."

These plans were copies of the Engraved Plan.

Letter from Commissioners to Sprigg, Chairman of a Committee of Congress, February 5, 1802 (Ib., page 2269):

> "The proposed canal is not in all its parts designated on the plan of the city usually met with; that plan was engraved by order of President Washington, and has been generally pursued in laying out the city as far as it was found practicable on an actual survey of the ground; but some deviations were made which appear on a plan in this office, sanctioned by the President. The bed of the canal was changed in part of its course in the year 1795 by direction of the President and with consent of the Proprietors of the adjoining lots."

From opinion of the Attorney General, April 5, 1806 (Ib., p. 2274):

"Major L'Enfant having been dismissed, Major Ellicott was in 1792 employed to prepare a plan, which he accordingly did; and, although the groundwork of the plan was the design of L'Enfant, yet President Washington declares that many alterations deemed essential were made in it with his approbation, particularly in the public squares, which, except those of the Capitol and President's House, were struck out of L'Enfant's design, and left to future determination. This plan, thus completed, was sent to Philadelphia to be engraved, was accordingly engraved, was promulgated throughout the United States, and, to use the expression of President Washington, was thereby intended to receive 'its final and regulating stamp.'

"I am, therefore, of opinion on this part of Mr. Davidson's memorial, that the plan of L'Enfant, so far as respects the lots which he now claims as building lots, was never established as such by President Washington; that, although they appeared in the plan of L'Enfant, yet they were struck out of the plan which was afterwards drawn by Mr. Ellicott, *engraved by order of the President, and declared by his successive acts to be the plan of the City which he would not depart from in any instance, where it could be avoided.*"

Letter from N. King to the President, September 25, 1803 (Vol. 6, pp. 304, 306):

"The publication of the Engraved plans was considered by the Executive as 'giving the final and regulating stamp' to the City of Washington, defining the limits of property and exhibiting the advantages and choice of situations to those who, by purchase or otherwise, should become interested in the future Metropolis of the Union. . . .

"Although the engraved plans (Ellicott's map), as well as Major L'Enfant's, carried the streets to the navigable water, exhibiting how the improvements and streets on the flats, *which must be filled up to arrive at the channels*, were to take place, it has been laid out on the ground and acted upon in sales no further than the bank of the river."

Letter from Commissioners to Dennis, Chairman of Committee of Congress, March 23, 1802 (Record, Vol. 4, pp. 1606–7):

> "Major L'Enfant's plan of the city was sent to the House of Representatives the 13th of December, 1791, by President Washington for the information of the House, and afterwards withdrawn. Many alterations were made therefrom by Major Ellicott with the approbation of the President and under his authority; all the appropriations (except as to the President's square and the Capitol) were struck out and the plan thus altered sent to the engravers, intending that work and the promulgation thereof, to give the final and regulating stamp. . . . It has since been pursued in all the operations in the city under the direction of the Commissioners as far as it was practicable."

The above extracts sufficiently show that the engraved plan of Ellicott became the authentic plan of the city, and that the operations of the Commissioners were conducted with the design of laying out the same upon the ground, and that this object was accomplished to the greatest practicable extent. It does not fully show the reservations (appropriations) of land in the city for the public use, which were not finally determined upon until after its appearance. This fact, and the further fact that the Commissioners subsequently, as above stated, laid out or caused to be laid out and divided with the proprietors a number of squares upon vacant spaces, thus introducing squares into the city which were not indicated on that plan, led to the preparation of another plan under the direction of the Commissioners by Dermott, a surveyor in their employ. Some account will now be given of this plan by further extracts from the public records.

The Dermott Plan, Also Known as the Map of the Public Appropriations, and as the Tin Case Map.

Extract from Minutes of Proceedings of the Commissioners, June 15, 1795 (Record, Vol. 2, p. 658; Vol. 7, p. 2230):

"Mr. Dermot directed to prepare a plan of the city with every public appropriation plainly and distinctly delineated, together with the appropriation now made by the Board for the National University and Mint."

Letter from commissioners to Morris and Nicholson October 1, 1796, (Rec., Vol. 2, p. 659; Vol. 7, p. 2234):

"We have addressed the President very fully on *the necessity of specifically and permanently fixing the several public appropriations* in the city, and have no doubt this will be done. We shall have them plainly and distinctly delineated on our large map, made out with great care and accuracy, and which will be preserved among the original records of the city."

Letter from Commissioners to President January 2, 1797 (Rec. Vol. 2, p. 658 ; Vol. 7, p. 2238):

"It is by no means our wish that any alteration should be made in the published plan of the city. It may with great truth be asserted that every change occasions infinite trouble to the Commissioners and creates confusion with the proprietors."

From letter of Commissioners to President, January 31 1797; (Rec., Vol. 7, p. 2238):

"We do ourselves the honor of enclosing to you a sketch of such description of the public appropriations as will, we think, be sufficient to identify them in the deed from the Trustees. It is submitted for consideration."

Letter from Commissioners to Samuel Davidson, February 2, 1797 (Rec., Vol. 7, p. 2239):

"We shall by next post forward to the President of the United States an instrument of writing for his execution, if it meets his approbation, by which the public appropriations will be finally determined.

. . . *The engraved plan has been the general rule in our transactions heretofore, agreeably to which we shall form the instrument intended for the President's signature.* Indeed we had no knowledge of the other until two months ago," [referring to the L'Enfant map].

Letter from Commissioners to the President, February 3, 1797 (Rec. Vol. 2, p. 660; Vol. 7, p. 2240):

"It is with much regret that we trouble you with the inclosures, but as the appropriations will now be finally determined, we hope it will be the last application on that subject.

"We have only to observe that Mr. Davidson has received payment for his portion of the President's square as delineated in the original plan."

Letter from the Commissioners to William Craik, Phila., June 25, 1798 (Vol. 7, p. 2251):

"Some days ago we sent the Plan of the City of Washington to the President, in order to procure the directions to the Trustees to convey the Streets and public property in the City to the Commissioners. The plan is enclosed in a tin case, too large to go by the ordinary conveyance of the mail. Mr. Joseph Nourse was so obliging as to take the charge of it to Philadelphia, and we request the favor of you to bring it with you when you return, as the enclosure is of great importance, *being the evidence of the public property in the city.*"

President Washington to Beall and Gantt, trustees, March 2, 1797:

"You are hereby requested to convey all the streets in the city of Washington as they are laid out and delineated in the plan of the city hereto annexed, and also the several squares, parcels and lots of ground following," [then follows a description of 17 large areas known as Reservations or Appropriations,] "to Gustavus Scott, William Thornton and Alexander White, Commissioners," etc.

Record, Vol. 6, p. 152.

Commissioners to President Adams, June 21, 1798:

> "At the close of the late President's administration, he executed an act directing the trustees of the city of Washington to convey to the Commissioners the streets of the said city and the grounds which were appropriated to public use. In the pressure of business the plan was not annexed. . We now send it by Mr. Nourse, with the original act, and the draft of another act, which appears to us proper to be executed by the present President in order to remove any objections to a compliance with the late President's request, arising from the omission we have mentioned.
>
> "As these acts are the authentic documents of the title of the public to the lands appropriated, we shall write to Mr. Craik, or some other gentleman, to take charge of their return, rather than trust them to the mail."
>
> Record, Vol. 2, p. 660.

Letter from Commissioners to Beall and Gantt, Trustees, November 15, 1798 (Ib. p. 2255):

> "We have for some time had the instructions of the President for your conveyance of the public Appropriations annexed to a Map, whereon they are particularly delineated; and a deed has long been drawn. We request the favor of you to let us know when it will be convenient to you to execute this conveyance."

Letter from the Commissioners to Messrs. Law and Barry, April 11, 1801 (Ib., p. 2268):

> "We have received your letter of yesterday's date, and imagine the subject of your inquiry has already been satisfactorily acted upon by our predecessors, previous to the publication of the Map of the City; and, lest any alteration should have taken place by currents, we caused the soundings to be again taken and laid down in the *Map of the public appropriations* which is now in our office, and from which we have no objection that a public statement be made whenever you think proper."

By the act of Congress approved May 1, 1802 (2 Stats. 175), the Board of Commissioners appointed under the act of July 16, 1790, was abolished, and their powers and duties were devolved upon a Superintendent to be appointed by the President.

Letter from President to Monroe, Superintendent, July 14, 1804, (Ib., pp. 2272–3):

> "The plan and declaration of 1797 were final so far as they went; but even they left many parts unfinished, some of which remain to be still declared."

From opinion of Attorney General, April 5, 1806 (Ib., p. 2275):

> "In March, 1797, President Washington executes an instrument of writing in which he directs the trustees to convey to the Commissioners all the streets as delineated in a plan said to be annexed. This by accident was not annexed; but is said by the Commissioners to have been annexed and sanctioned by President Adams in 1798."

The Dermot plan indicates the location and extent of the public reservations or appropriations and also the new squares introduced and not shown on the Engraved Plan, and which were laid out on the open spaces at the intersection of streets appearing in that plan; and otherwise shows substantially the progress which had been made to the time of its date (1797) in laying down the city upon the ground in accordance with the scheme or design of the Engraved Plan. That it was not a complete map of the city in all respects is evident from the fact that it was not wholly in accordance with even the "instrument," to which it was annexed, for in the description of appropriation 17, the President's Square, one of the boundaries called for by the instrument, is not shown on the plan at all; square south of Square 173 was surveyed and returned July 16, 1793, but it is not numbered on the Dermott plan, and is not

even fully outlined according to the survey. In the deposition of John Stewart (custodian of the early city records), the principle features of the Dermott plan not shown in the Engraved Plan are noted (Vol. 4, pp. 1544–1561), and it is stated that new squares were introduced after its appearance. Both the Dermott plan and the later plan of King show the location of the water line with reference to the squares of the city; both also show that some squares were laid out partially and others wholly in the waters of the Potomac and Eastern Branch.

The King Plan.

The King plan was prepared by Nicholas King and bears date 1803 (Rec. Vol. 2, pp. 636–7), at which time he was the Chief Surveyor of the city. It is composed of 16 sheets, and was no doubt completed in that year, but the evidence shows that it was in process of preparation in the year 1797, at which time King was one of the surveyors under the Commissioners (Rec., Vol. 2, p. 637; Rec., Vol. 4, p. 1527). He entered the service of the Commissioners as an assistant surveyor September 21, 1796 (Rec., Vol. 4, p. 1624), and retired from it September 12, 1797 (Rec., Vol. 4, p. 1632); he was appointed Chief City Surveyor August 24, 1802. (Rec., Vol. 2, pp. 636–7.) In the meantime he was employed by Robert Peter and other proprietors. The King plan differs from its predecessors in being the only one upon which are laid down the lines of the holdings of the original proprietors, and it shows the street along the Potomac River shown on the Engraved Plan.

Samuel Davidson, one of the original proprietors, who was then engaged in a controversy with the Commissioners, demanded in a letter to them, dated August 14, 1797 (Rec., Vol. 4, p. 1553), that the President's square should be restored to its original form as shown in L'Enfant's plan, for certain reasons, and—

> "because it will then appear in its true position in Mr. King's elegant and descriptive work now going forward in your office."

Capt. Stewart, who, under Col. Wilson, Corps of Engineers, U. S. A., was in charge of the old records of the city, states (Rec., Vol. 4, pp. 1552, 1709) in response to a question as to the map referred to in an entry in the Commissioners' Minutes of May 4, 1802—

> "prepared in conformity with the directions of the Board, and according to the large plan of Water Street,"

that in his opinion—

> "the portfolio, map known as N. King's Map, is the map referred to—it is the only early plan of the city showing Water Street eighty feet wide, according to the large plan of Water Street by Nicholas King, except the Brown Sheets so called."

The plan of Mr. King is manifestly an elaborate piece of map-making, and Capt. Stewart, who is himself an engineer and draughtsman, and competent to speak upon the subject, also says (Ib., p. 1565) that it would take about 18 months for—

> "a man of high skill as a civil engineer to prepare such maps as the King portfolio maps from the original returns of the surveyors of the City."

This was the witness' opinion, based upon the assumption that the engineer should give his whole time to it—

> "But if Nicholas King had other duties to perform in connection with his office, it would take him longer to prepare the portfolio plats, in proportion to the outdoor work he would have to perform."

Under date of March 8, 1797, Nicholas King, then in the service of the city as a surveyor, addressed to the Commissioners a letter, in which he states:

> "I herewith send you a series of plans exhibiting that part of the city which lies in the vicinity of the

water, *and includes what is called the water property,* from the confluence of Rock Creek with the Potomak to the public appropriation for the Marine Hospital on the Eastern Branch. What appears to me the most eligible course for Water street with the necessary alterations in the squares already laid out, or the new ones which will be introduced thereby, are distinguishable by the red lines which circumscribe them, while those already established are designated by the black lines."

Record, Vol. 4, p. 1602.

The plans referred to are twelve in number, and are described by Captain Stewart, custodian of the records, on pages 1638 to 1643 of volume 4 of the Record. They are important in certain particulars as showing proposed alterations in the squares abutting on Water street, as it then existed; a comparison of the King plan of 1803 with this series of plans of 1797 shows that in respect of Water street, and the squares abutting it, both are the same, and that the Water street as shown on the plan of 1803 had been adopted and was in existence as early as 1797.

This series of plans of 1797 is further important as showing the sense in which the term "water lots" was used by Mr. King in 1797.

The legend on Plan No. 1 is as follows:

"Plan of part of the city of Washington, exhibiting the water lots and Water street along the Potomak, from K street north to 25th street west."

This plan shows Water street and parts of a number of lots and squares *actually laid out in the water.*

The legend on Plan No. 2, covering the space "from 23rd to 20th streets west," is the same as that on Plan No. 1. Upon Plan No. 2 streets and parts of squares and lots are shown *which are actually laid out in the water.*

The same remarks apply to the legend on Plan No. 3.

The legend on Plan No. 4 shows a variation. *No part of the lots and squares delineated on it are laid out in the water;* for which reason the words "*water lots*" are omitted from the legend, which reads as follows:

"Plan of part of the city of Washington, exhibiting Water street, from 10th to 15th streets west."

The legend on Plan No. 5 also omits the words "water lots," *no part of the lots and squares delineated upon it being laid out in the water;* it reads as follows:

> "Plan of part of the city of Washington, exhibiting Water street on the Potomac, from 10th street west to South M street."

The same remarks apply to the legend on Plan No. 6, which is:

> "Plan of part of the City of Washington exhibiting the Water street on the Potomac from N to T streets south."

And the same remarks are applicable to the remaining plans numbered seven to twelve.

King entered in August, 1802 (Rec., Vol. 2, p. 637), upon his duties as chief surveyor of the city, under the superintendent who had succeeded to the powers of the Board of Commissioners, from which date to the date upon the map was a period at most of but sixteen months.

Mr. Forsyth, who had been connected with the office of surveyor of the city, both in subordinate capacities and as the head of it, and who is now the surveyor of the District of Columbia, and who in consequence had become familiar with the work of the different surveyors who had preceded him, says:

> "I find, as compared with all other maps and plats which to my knowledge have had any connection with the surveyor's office of the old city of Washington, that there is a distinguishable character

about the work of Mr. Nicholas King by which it can be recognized at sight. It is neat and careful to a degree. It is excellent work of its kind. In my judgment he was one of the most thorough engineers of this or any other country."

Record, Vol. 3, 928–9.

And again he says, when asked if he was familiar with the history of the King map:

"I can not say that I am, especially as to details; I can only say that it is the best in point of execution of the early maps of the city; and that it has been acted upon ever since it has been prepared in connection with the affairs of the surveyor's office, and that the lines of wharfing indicated upon the map from Rock Creek to Easby's Point have been followed; in other words, that all the improvements, such as reclamation of land, and the wharves that have been built in that section of the city, were made and built in accordance with the plan of wharfing, etc., indicated on this map. . . . The map of 1803 has always, in my recollection going back forty years in connection with the surveying department of the city, been considered and acted upon as an official map, and from conversations with those who have preceded me in the Surveyor's Office, I know that it was always considered by them as an authentic official map of the city. *It has in fact been the standard map.*"

Ib., p. 936.

The foregoing considered alone, and especially when considered in connection with the *Wharfing Regulations*, promulgated by the Commissioners under the authority conferred upon them by the Maryland Act of 1791, above noted, would seem to establish beyond the possibility of serious controversy the fact that in laying out the city, its

founders, who had full powers in the premises, intended that its limits should include the rivers to their navigable channels, and that Congress by the powers which it conferred upon the City Corporation when created recognized the fact.

The *Wharfing Regulations* were issued July 20, 1795, and read as follows:

> "That all the proprietors of water-lots are permitted to wharf and build as far out into the River Potomac and the Eastern Branch as they may think convenient and proper, not injuring or interrupting the channels or navigation of the said waters; *leaving a space, wherever the general plan of the streets of the city requires it, of equal breadth with those streets*; which if made *by an individual, holding the adjacent property, shall be subject to his separate occupation and use* until the public shall reimburse the expense of making such street; and where no street or streets intersect said wharf, *to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground.*"
>
> Rec. Vol. 6, p. 180.

Here we have the formulation of a scheme, clear and complete, for the making of streets by the reclamation of land, between the navigable channels and the fast land adjoining the shores, and an assertion that all of such lands out to the navigable channels were appropriated to the uses of the city, and hence included within its limits.

The City, After Its Incorporation, Claimed and Exercised Jurisdiction Over the Portions of the Rivers Adjoining the Mainland.

The city from its first incorporation in 1802, assumed and exercised jurisdiction over the portions of the Eastern Branch and Potomac adjoining the mainland within its limits. Congress, by acts passed prior to 1839, creating the late corporation of the city of Washington, and in force

in that year, recognized the public character of the Potomac and Anacostia rivers, and conferred large powers over them upon the municipality in the interest of navigation and commerce; powers, with the exercise of which such grants as that made to Kidwell were wholly inconsistent, even if there had been authority for them otherwise.

By the Act of May 15, 1820, (3 Stats. 587), it was provided, that the city should have power—

> *"to preserve the navigation of the Potomac and Anacostia Rivers, adjoining the city; to erect, repair and regulate public wharves, and to deepen creeks, docks and basins; to regulate the manner of erecting and the rates of wharfage at private wharves; to regulate the anchorage, stationing and mooring of vessels."*

We respectfully submit, that this legislation placed, as matter of law, the *whole* of that portion of the said rivers, which adjoined the fast land of the city, within the corporate limits.

A number of ordinances passed by the corporation, under its powers in the premises from 1817 to 1870, will be found in Volume 7 of the Record, pp. 2315 to 2350.

One of these ordinances approved October 9, 1817, authorized a survey to be made of the two rivers to ascertain what obstructions existed in the channels and to make report "of the most eligible mode and probable expense of removing the same."

Another approved July 12, 1819, required the owners of wharves to keep them in repair under a penalty and provided that "no wharf shall hereafter be built within the corporation," without the plan be first submitted to the Mayor—

> "who, with a joint committee of the two boards of City Council, shall examine the same, and if it shall appear to their satisfaction, that no injury could result to the navigation from the erection of such

> wharf, it shall be the duty of the Mayor to issue a written permission for the accomplishment of the object which shall express how near such wharf may approach the channel."

The ordinance further made it unlawful, under a penalty, to obstruct the channels—

> "by setting fish-traps or other like impediments, or by casting ballast, dirt, oyster shells, or any other thing into the water which might injure navigation."

Another ordinance approved July 20, 1827, authorized the Mayor "to raise the sum of four thousand dollars" and to apply the same—

> "to the improvement of the Potomac and Anacostia Rivers, by excavating the channel and by planting wing-dams and other obstructions where necessary,"

as recommended in the report of H. L. Barnum to the Mayor, etc.

Under date of August 5, 1828, William Easby, who had charge of the work, reported to the Mayor—

> "that the bar at the mouth of the Eastern Branch of the Potomac is no longer an obstruction to vessels passing in or out; there being at this time (at common high water) twenty-one feet water. This is a sufficient draught of water for frigates of the largest class, with their guns on board."

By an ordinance approved June 3, 1830, provision is made for the construction of a basin at the mouth of Tiber Creek, "to receive the eastern termination of the Chesapeake and Ohio Canal." etc.

An ordinance approved April 21, 1835, constituted the Mayor and a member from each board of the councils a committee—

> "to collect and report information in relation to the navigation of the Potomac from the month of the

> Eastern Branch to Georgetown, and the most advisable means of opening the same, with the probable cost thereof."

An ordinance approved December 27, 1847, provided for the appointment of a committee to examine and inquire—

> "whether or not some artificial means might not be successfully applied to induce a more favorable direction of the current above the bridge, tending to restore the navigation on the Washington side of the river to Georgetown," etc.

By an ordinance approved April 3, 1855, provision was made for the purchase of a steam dredging machine for the use of the corporation.

By one approved November 12, 1859, five thousand dollars was appropriated for dredging the west or Virginia channel of the Potomac, the corporation of Georgetown to contribute a like sum for the purpose.

By one approved July 27, 1861, bathing and swimming is prohibited—

> "in the jurisdiction of the corporation of Washington at any time between the hours of 6 a. m. and 8. p. m,"

excepting in that part of the Potomac between Fourteenth and Twentieth streets and that part of the Anacostia east of Fifteenth street east.

By one approved March 23, 1863, the Mayor is authorized—

> "to lease for any term of years, not exceeding ten, wharf-sites in front of any sea-wall heretofore built by this corporation, or in front of any sea-wall that may hereafter be built in pursuance of any enactment for that purpose,"

and provided that each wharf-site should be—

> "of the breadth of one hundred and fifty feet in the front or water-line, seventy feet of which shall be left open between each wharf for docks, the wharves to be built on the south line of Water street *extending to the channel of the river.*"

By one approved December 28, 1863, the appointment of a harbor-master is provided for whose duty it is made to enforce all laws—

> "for clearing the docks and wharves of the port of Washington . . . for regulating and stationing all ships or vessels in the stream of the river Potomac or Anacostia, or at the wharves, within the boundaries of the city of Washington," etc.

By Joint Resolution approved April 9, 1870, the mayor was requested—

> "to notify all persons occupying wharves on the river front, from 14th street to the Arsenal grounds, and who do not pay rents to this corporation, to vacate said wharves within thirty days, and to institute suit against those who do not comply, to obtain possession thereof."

The matter of the boundary of the city on the river side was involved in a suit brought to enforce one of these ordinances, and has in fact been judicially determined by the courts of the District. The corporation of the city of Washington passed an ordinance February 7, 1852 (Rec. Vol. 2, p. 530), providing:

> "That it shall not be lawful for any boat or vessel propelled by steam to run at a greater rate than eight miles per hour, in approaching or leaving the city, north of the Washington Arsenal. And the master or commander who shall run his boat or vessel at a greater speed than eight miles an hour shall forfeit and pay the sum of twenty dollars for each and every offense; one half of said fine and forfeit shall go to the informant, and the other half for the use of this corporation."

The corporation brought suit May 19, 1852, against Job Corson, master of the steamer George Washington, before a justice of the peace, to recover the penalty, charging him with a violation of the ordinance on May 18, 1852. There was a

trial and judgment for the city, and, on appeal to the Circuit Court of the District, this judgment was affirmed with costs, Nov. 3, 1852.

If the opinion of the court was in writing, it can not now be found; but we are not without information as to the scope of the discussion, and the points in judgment.

The city was represented by Mr. James M. Carlisle, the Corporation Attorney, and by Mr. Walter D. Davidge. It was the duty of the Corporation Attorney, under the corporation laws (Rec., Vol. 7, p. 2389), to keep the corporate authorities advised as to all decisions affecting the interests and rights of the city, and in the performance of such duty, and in regard to the case mentioned he wrote the Mayor, under date of November 4, 1852, as follows:

> "I have the satisfaction of reporting to you that, upon full argument of the above entitled appeal, the judgment below has been affirmed with costs, and the validity of the ordinance, regulating the speed of steamboats approaching and leaving the city within certain specified limits, established by the court. The two points which I consider of great importance to the corporation, and which have been settled by the court are:
>
> "*1. That the corporate limits of the City of Washington extend to the middle of the main channel of the river.*
>
> "2. That the ordinance in question is not a regulation of commerce (as was contended by the appellant), but a proper police regulation within the granted powers of the corporation."

Many convincing considerations are advanced by the court below in support of this decision. The language of the Act of Maryland of December 19, 1791, in describing the land to be included in the city, followed that of the deeds of trust from the proprietors; among other reasons upholding its sufficiency to carry the boundaries of the city to

the center of the stream, the following are given in the opinion (Rec., Vol. 7, p. 2523):

> "The words of the recital in the Maryland act naturally spoke only of *the lands* which were to be *surveyed and laid out* comprehended within the courses given; but there are no words excluding the adjacent waters. The words 'then with the waters,' under the decisions, carry the lines to the middle thread of the river.
>
> "Such was the ruling of the Supreme Court in Jones *vs.* Soulard, 24 Howard, 65. The boundary of the city of St. Louis was described in its charter as 'beginning with Antoine Roy's mill, on the bank of the Mississippi,' and the closing words of the description were, 'thence due east *to the Mississippi; from thence by the Mississippi to the place first mentioned.*' The court says that 'from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the river and entitle him to their accretion; that this general rule is part of the American and English law of property is too well settled to be open to discussion;' and that the inquiry before the court in that case was 'whether the rule applies to so great and public a watercourse as the Mississippi is at St. Louis?' And, calling attention to the fact that the grant contained nothing to form an exception from the rule, they hold that the city charter extends to the middle of the river Mississippi. Certainly the terms of the grant in the Washington charter 'do not clearly denote the intention to stop at the edge or margin of the river,' in the language of the opinion; nor do they contain any suggestion of such an intention, and hence the words carry the right of the city to the center of the stream."
>
> 3 Kent's Com. 427.

Certainly, as held by the court below, Congress could not have intended that the adjoining City of Georgetown should

have been favored with a boundary on the Potomac which was denied the Capital City.

> "In 1809 (Ch. 30, 1809, 2 Stat., p. 537) Congress defined anew the limits of the town of Georgetown (which had been incorporated by Maryland in 1751) and declared they should extend 'to the middle of Rock Creek, thence by the middle of the same creek and *the middle of the Potomac River*, to a point directly opposite the middle of College street,' which was the western boundary of the town. It would have been remarkable that the half of the river subtending Georgetown should have been included within its jurisdiction, and that Congress should have withheld a similar concession to the adjoining Capital City of the Nation." Rec., Vol. 7, p. 2525.

The court refers to sundry acts of Congress conferring jurisdiction upon the corporation of the city over bridges crossing the Potomac and the Eastern Branch, and in regard to one of these acts it is said (Rec., Vol. 7, p. 2527):

> "By the act of 3d of March, 1839, Ch. 229 (5 Statutes, 364), it was enacted that the bounds of the City of Washington and of the County of Washington were extended so as to comprehend the causeway and bridge lately constructed across the river Potomac *to the opposite shore*, and the corporation was thereby empowered to adopt and enforce necessary rules and regulations for the safety and security of persons and property passing the causeway and bridge. The puspose of this act for the protection of the bridge was to extend the jurisdiction of the city beyond the middle of the main channel, to which it had previously been limited, and not to confer jurisdiction over the waters for the first time, as was urged by John Wilson in his brief to the Commissioner in behalf of the patent."

The decisions in which the question has been considered, of the boundaries of municipal corporations with reference to streams upon which they are situated, are conflicting; but in every case they grew out of the specific language of the acts of incorporation, and where they have been held

to extend only to high or low water mark, the decision has rested upon the supposed analogy of the cases to those in which there was a grant from one individual to another.

Gould on Waters, Sec. 202.

These decisions can have no bearing upon a case where the circumstances are so unique and peculiar, as in the case at bar, in which such limits are to be determined by the acts of public officials, acting under a general and comprehensive power, and by legislative acts which do not profess specifically to define them.

There was no Channel between the Flats and the Mainland in 1869.

If the land granted by the Kidwell patent was not part of the bed of the Potomac River when the patent was issued in 1869, then said land was simply an accretion to the mainland of the city, as averred in the bill; for the reason that there was no channel between the land granted and said mainland.

The Engraved Plan of Ellicott is the first upon which the channels of the Potomac are exhibited; it shows them as they existed in 1792, at which time they were three in number; the main channel, leading to Georgetown, was along the Virginia Shore, from which it took the name of the "Virginia Channel," or "Georgetown Channel," and the smaller channel of the three, both in width and depth, was along the Washington shore, and became known as the "Washington Channel;" the other channel was between these two and it extended from a point in the "Virginia Channel" below Easby's Point, in a southeasterly direction across the flats, until it united with the Washington Channel, between the foot of Ninth street and that of Eleventh street west; this channel was originally known as the "Middle Channel" and subsequently as the "Swash Channel." The construction of the causeway of the Long Bridge had much to do with its destruction. The Engraved Plan shows the

erflowed flats between these channels, but while the plan ves the depth of water in the channels, it does not ve the depth over the flats. The Dermott map of 1797 es not show the flats and gives only the soundings in the annels.

Both the "Washington Channel" and the "Middle Chan-l" were due principally, in the opinion of Benjamin H. trobe, an eminent engineer, and in the early days con-cted with the office of the Surveyor of the City, and with e public buildings, to the action of the tides.

In the case of the Washington Bridge Co. *vs.* The Corpo-ion of Georgetown et al., instituted in the Circuit Court the District December 13, 1810, his deposition was taken; it he says, among other things:

> "Yet, as it is my opinion that a considerable current will always take that course if not obstructed [that is, the course of the Virginia Channel]; it is, therefore, also my opinion that if that channel [that is, the Virginia Channel] be left open, the current through the Middle Channel, which will be strengthened only by the addition of the water which finds its way southward across the flats, will not be sufficiently strong to make any very sensible change in the depth of that channel below the wing dams. . . . The tide of flood which proceeds up the Potomac finds the greatest resistance from the main stream which comes down the Virginia Channel, and the least along the city shore. It therefore makes its way first and strongest along the city shore, and I cannot but consider the present city channel to be *principally* the work of the flood tide, and also that the Middle Channel owes its existence in a great degree to the flood tide deflected at the bend of the shore between Squares 473 and 391."
>
> Record, Vol. 2, pp. 511, 512.

Mr. Forsyth, Surveyor of the District of Columbia, testifies ecord, Vol. 3, p. 941):

"I find on the Dermot or Tin Case Map a line of soundings given for a channel along the shore at the Observatory. This channel must have been a narrow and insignificant one, as the soundings are in a single line and not in the zigzag manner indicated in the other two channels shown on the map, which latter plan would have been followed, if the shore channel had been of any width."

". . . Whatever channel may have existed along the shore at this point prior to and at the time of the construction of the Chesapeake and Ohio Canal Company's canal was largely affected by the construction through the water of one of its banks, which construction required a great deal of filling and this had to be done in this channel and at its expense."

And speaking of the channel described by Mr. Carpenter, who surveyed the socalled Kidwell meadows, he says:

"I cannot say anything as to the correctness of Mr. Carpenter's statement as to the channel he describes as existing there. He gives no soundings or actual measurements as to this channel, and nothing but a very vague description, such as might be judged by the eye. I have not sufficient information upon which to base an opinion as to whether the channel referred to by Mr. Carpenter is the one or part of the one of Dermot's day or not."

Other evidence in the case, viz: the maps of surveys of the river made at various times since, shows conclusively that the construction of the Chesapeake and Ohio Canal in the channel had the effect of completely destroying it.

See testimony of—

John W. Easby, Rec., Vol. 2, p. 235.
Francis M. Byram, Ib., p. 263.
Thomas J. Galt, Ib., p. 339.
George W. Harkness, Ib., pp. 401, 404, 405.
James Kelley, Ib., p. 407.
Charles T. Smith, Ib., pp. 726, 727.
Henry H. Dodge, Vol. 3, p. 1000.

The testimony of Henry H. Dodge (Record, Vol. 3, p. 1001) is especially pertinent as showing the condition of the flats and of this channel on December 6, 1869, the date of the patent to Kidwell. Dodge was made party defendant to the bill as claiming under a lease dated September 5, 1866, from the Chesapeake and Ohio Canal (Record, Vol. 1, p. 83) of a tract of land bounded by the south water-line of the canal and by the Potomac River and extending from Easby's Point to Seventeenth street—

> "together with all the right, title and estate of the said company therein, and all the rights and privileges of the said company in and to and arising out of the said tract of land,"

with a right reserved to the company of using the same as a towpath. Mr. Dodge states that his attention was called to the Kidwell patent through a publication in the *Evening Star* newspaper, which is incorporated in his testimony; that he showed the notice to Mr. John A. Wills, a lawyer and friend, and that together they walked along the shore from Seventeenth street towards Easby's shipyard, crossing a waste-weir for the overflow of water from the canal into the river about what was known as the site of the old glass-house; that at this point he called Mr. Wills' attention to the fact that the water was flowing up towards Easby's Point, and that he (Dodge) remarked:

> "It is nothing in the world but a little gut formed in the mud here for this water to get into the river at low tide,"

and that this occurred immediately after the date of the publication in the *Star* of January 27, 1870. He then states:

> "After that, on March 20, 1870, I took Mr. I. Thomas Davis, who is here present, and Col. Frank Jones of Georgetown, and we went down there and walked over the whole of it to show them that at high tide the land was overflowed and that no land was visible, nothing but wild oats or marsh-grass

growing through the water, through which I have frequently been pushed in a gun-skiff and shot reed birds and ortolans; and, with the exception of the wild oats where the reed-birds came, the whole surface was entirely overflowed with water at high tide up to the bank of the river, which is practically an extension of the tow-path of the canal.

"I made notes in my diary of these several trips, one with Mr. Wills about January 27, 1870; with Mr. Davis and Col. Frank Jones on March 20, 1870, and with Mr. James C. Kennedy, who is since deceased, on April 12, 1870.

"From my close observation a number of times of the situation of matters at the river shore in this vicinity, I am fully prepared to state that there was nothing deserving the name of a channel along the canal bank on the Washington shore of the river. I use those two terms, canal bank and Washington shore, as practically convertible terms for the reason that the Boschke maps and the plat accompanying the answer of the Chesapeake and Ohio Canal Company show that the canal company, in constructing the canal and the towpath of the canal from Easby's Point to the basin, provided by the Corporation of Washington at 17th street, filled up and reclaimed the ground that was necessary for the canal and the towpath for nearly the whole distance, the points where firm land was found in extending the canal being shown upon this plat 'Exhibit C. and O. No. 1.' The tide made in both at Easby's Point and from 17th street and met about at the waste-weir, near what was called the old glasshouse, somewhere in that neighborhood. Of course, if there had been a clear channel all the way through, there would have been no division of the waters upon the recession of the tides, but all would have gone one way, and there would not have been that rapid current which first attracted my attention and about which I made the experiment I have spoken of. When I saw it, of course, it was low tide and the stream, such as it was, consisted of the overflow of the water over the waste-weir that was escaping from the canal and finding its way to the river at low tide.

"A reference to the Ellicott map of 1792 shows soundings along the shore indicating that there was at that early day a narrow channel at that point along the shore. It also shows a large channel cutting across the flats from the main or Georgetown channel some considerable distance below Easby's Point, and running into the 'Washington channel' opposite 10th and 12th streets, southwest. This latter channel, as I have always understood, went by the name of the 'Swash Channel' in contradistinction to the channel along the shore, which was called the Washington channel, from the Arsenal to Tiber Creek at 17th street. The channel along the shore from Easby's Point to 17th street, whatever it was originally, became in the course of time obliterated, and was practically destroyed at and prior to the time this Kidwell patent was issued.

"The Kidwell flats, according to the survey of them made by Mr. Carpenter, were separated from the canal bank and shore, as he says, 'by a boat channel from three to five feet deep, and from ten to fifty feet wide;' but I know as a matter of fact, from the observations which I have just described and my interest in the locality, that no such channel as described by him had any existence along that shore whatever. With the exception of a difference of a few inches immediately along the shore, in the little gut I have referred to, there was practically the same depth of water all over the flats from the shore out upon the same tide.

"I have read the affidavits as to the passage of the steamer called the 'Enterprise' in this so called channel along the shore to Easby's Point, which affidavits were filed in the Land Office in connection with the application for the Kidwell Patent, and I have no hesitation in saying that the same boat which is said to have steamed along the shore through this alleged channel could have steamed with equal facility and readiness over any part of the flats between the shore and the Georgetown Channel on the same tide.

"I have read the directions given by the Commissioner of the General Land Office to Mr. Carpenter,

the County Surveyor, to survey and lay off for Mr. Kidwell the ground that he desired to obtain a patent for, and find that it contains a provision restricting him in making that survey, which provision is to the effect that he shall lay off the land claimed provided 'he find it to be firm land and not subject to tidal overflow.' I have also seen the return of survey made by Mr. Carpenter, in which he says that he made the survey on October 9th and 10th, 1867, and I have no hesitation in affirming in the most positive manner that at that time the ground that Mr. Carpenter returned as having been surveyed by him was completely overflowed at ordinary high tide."

James C. Pilling accompanied Mr. Carpenter on the so-called survey, and acted as chainman. His deposition (Vol. 2, p. 63) shows that the survey was made "wholly" in the water:

Q. Please state where you reside?
A. Washington City.
Q. How long have you resided in this city?
A. Forty years.
Q. All your life?
A. Yes, sir.
Q. What is your present occupation?
A. Chief Clerk of the Geological Survey.
Q. How long have you held that office?
A. Seven years.
Q. Are you acquainted with one Benjamin D. Carpenter, a surveyor, who lives in this District?
A. Yes, sir.
Q. Did you assist him in making the so-called survey of the Kidwell Meadows in the year 1867?
A. Yes, sir.
Q. Do you remember the season of the year?
A. It was in the fall of the year.
Q. Can you fix the date any more definitely?
A. My recollection of it is that it was just before the winter; I should say that it was in the month of October, September or October; in October, most likely, because it was quite cold.

Q. Was the survey completed in one day, or did it take more than one day?

A. I think in one day; that is, so far as I had anything to do with it.

Q. What duties did you perform in connection with that survey?

A. I carried one end of the chain.

Q. Who helped in the survey besides yourself?

A. Mr. Carpenter ran the instrument, and a young man named McDaniel; I suppose he alternated with the flag; and there was another man named Burr, I think, carried one end of the chain, and then there was a laborer along, a man to paddle the boat and do other work; but I do not know who he was.

Q. Please state whether the lines of that survey were run on land or in water?

A. In the water.

Q. Partly or wholly?

A. Wholly.

Q. What was the depth of the water?

A. At the corner where the post was put I should say it was eighteen inches.

Q. Where what post was put?

A. For the initial point of the survey they drove a cedar post.

Q. And you took that as a starting point?

A. We took that as a starting point.

Q. Then you had to cross over water in the course of your work?

A. Yes, sir; I should say from three inches to eighteen or nineteen inches of water.

Q. Were the pegs driven in the usual way, or how were they driven?

A. We could not have found them if driven. We drove the cedar post as a permanent mark.

Q. How was the survey conducted?

A. We started at this initial point, where the cedar post was driven, and Mr. Carpenter set his instrument there, and we carried the flag ahead and stuck it in the mud, and the chain men went to the flag in a direct line; the foremost man of the chain would stick his iron pin down and move along, and then the rear man would come up to that pin. But pretty

soon we had to drop that system; and the foremost chain man would have to wait for the end man to come where he was before he dared to go on.

Q. Why?

A. We could not find the pins otherwise. This was not true in all cases.

Q. What was the reason the pins could not be found? What was the trouble?

A. Too much mud and too much water. Usually we had a bit of red flannel tied to the pin, but it did not help us much on this occasion.

Q. The pins and flag and all would be under the water?

A. Yes, sir.

Q. Did you at any time in running this survey come upon dry land?

A. No, sir.

Q. I would like to ask you what your observations were in regard to the land within the lines, not where the lines were run, but whether that was land or water within the lines?

A. It was soft, marshy soil. There was no place where you could walk on it, so far as I can remember, without sinking in; it was covered with a growth of reeds and flags.

Q. What I want to know particularly is whether you know that the enclosed space was covered by water, as well as the course through which you went?

A. I have no recollection about that, but naturally we would have taken the low water for that work; we went in the afternoon, and were in a hurry to get through, and I should suppose we would choose the time the marsh would be uncovered.

Q. Were you sworn before you began your duties as a chain man on that occasion; that is, take any oath?

Mr. HAMILTON: Question objected to.

A. No; I think not.

Q. Was the other chain man sworn, so far as you know?

Mr. HAMILTON: Question objected to.

A. No, sir.

Mr. John B. Duncklee, an engineer in the employment of the War Department, and who has been engaged on Government work in the harbor of Washington since 1874, and has been connected with the improvement of the flats since it was commenced, was summoned as a witness and testified as to his own personal knowledge in the premises and as to the significance of the Kearney, Ewing and other maps of the river. He testified that in the performance of his duty he had made frequent surveys and examinations of the river between Easby's Point and Giesboro Point, and repeated visits to the scene of the work of reclaiming the flats, and that he "was quite familiar with the situation at this point;" that he had never seen the cedar post referred to by Mr. Carpenter in his survey of the Kidwell Meadows. He states:

> "Prior to the time this filling began I know that at ordinary high tides the surface where the post described by Mr. Carpenter must have been placed, if placed at all, was covered with water, and that at all stages of the tide there was nothing but mud of a soft mushy consistency, in which such a post could not be placed with a certain assurance of remaining there for any length of time."
>
> Record, pp. 942, 943, Vol. 3.

He further testified that he had made surveys of the Potomac from Easby's Point to the Long Bridge in 1874 and 1878, and had taken soundings over the flats and examined them, and that the whole of the Kidwell meadows were under water at ordinary high tide in 1874 and also in 1878; that in 1874 there was between the flats and the mainland at the upper end near Easby's Point "a small drain from springs," about two or three hundred feet long, along the canal bank, in which there was at high water from a foot to a foot and a half more water than over the flats, and that in parts there was nothing that could be called a drain; that there was no navigable channel there either in 1874 or 1878; that Exhibit, U. S., No. 8, is a copy

of a map prepared by him in 1878; that the figures in r
on this map running southward from the letter **H** indica
the depth at mean low tide in feet and tenths of a fo
and the figures in black the depth at mean low tide; th
he went over the entire flats in a boat at high tide, a
that he never knew any one to walk over them; that at me
low tide the water was above the Kidwell Meadows, in 187
from zero to 1 and 1½ feet, the outer edges were out at abo
mean low water. Rec., Vol. 2, pp. 40–48.

After examining the map prepared by Col. Kearney, U.
A., in 1834 (Exhibit, U. S., No. 38, bet. pp. 18 and 19, Vol. 5
he states that the datum plan of this map is extreme lo
water, which is a plain or level about one foot below ave
age or ordinary low tide; and that the first row of figure
crossing the locality below Easby's Point, marked zero, an
the second, third and fourth rows crossing it, also marke
zero, mean that the depth of water at these points wa
either zero or about three inches; and that inasmuch a
there seemed to be no soundings marked exhibiting a differ
ence between zero and one half foot, the inference would b
that any soundings of less than three inches would be pu
down as zero, and that any soundings greater than thre
inches would be put down as half foot.

After examining the map prepared by M. C. Ewing i
1837 (Exhibit U. S. 43; Record, p. 73, Vol. 5), he say
that the first row of figures in the dotted space adjoin
ing the shore at Easby's Point show from three-tenths t
eight-tenths of a foot depth of water at ordinary low tide
and that the expression ".03" means no feet and three
tenths of a foot, and that in respect of the area below Easby'
Point he says that the Ewing map and the Kearney map
indicate the same condition of affairs, "they show that these
flats were overflowed at ordinary low tide;" and after hav-
ing examined the Woodruff map of 1857 (Exhibit U. S.
No. 36; Record, between pages 58 and 59, Vol. 5) he states

from the engineering symbols used on this map it is indicated that the flat extending from Ea[illegible]'s Point down to midway of the Observatory grounds was overflowed at high tide and exposed at low tide, by which was not meant that there would be an exposure of dry land as ordinarily understood, but an area of marsh or mud or sand overflowed by the tide. Record, pp. 421 to 431, Vol. 2.

The testimony of Benjamin A. Colonna, of the Coast Survey Office, is to the same effect in respect of the significance and import of the several maps. Record, pp. 337 to 381—431 to 435, Vol. 2.

Col. Hains, the Engineer Officer of the Army, under whose direction the work of the reclamation of the flats was first conducted, states, in regard to the locality known as the Kidwell Meadows, that it was subject to tidal overflow at about half tide, and some of it at mean low tide; that some of it was subject to tidal overflow at mean or low tide, and that some of it was never uncovered except when much of the water was blown out of the river; that when the river was at medium high tide there would be an overflow of the flats; that he knows positively when he began work, in 1883, there was no channel between the flats and the mainland; that there could not have been a navigable channel there, which had been filled up, without his knowing it; that in filling the flats a railroad had been constructed by driving piles over them—

> "by means of a floating pile-driver, that is, in part by means of a floating pile-driver, which is evidence in itself that the flats were subject in part to tidal overflow;"

that there were five lines of track laid on the part where the filling had been made—

> "and each one of those lines crosses the Kidwell Meadows in the direction pretty general perpendicular to the general trend of the longer side or axis of the meadows;"

and that one of these tracks crossed very near the midd point of the meadows, and that a swash channel ran to th south of the Kidwell Meadows. Record, pp. 3 to 39, Vol.

Alfred Spates, a witness examined on behalf of the tru tees of the Chesapeake and Ohio Canal Company, states th he was president and general superintendent of the can from May, 1860, to June, 1865, and again from 1867 to abou 1870, and that he was familiar with that portion of th canal between Rock Creek and Seventeenth street, northwes and that there was not to his knowledge a navigable strea between the towpath of the canal and the flats or meadow in the Potomac River from Easby's Point to Seventeent street, and that "there was a stream of water—a sluice- running along there some eight or ten or twelve inches deep, and that over these flats from Easby's Point down to th Long Bridge the tide ebbed and flowed during the period of his term of service; that when the tide was out "yo could see tufts of grass along there, muddy places, swamp places," and that the tide ebbed and flowed up the bank o towpath of the canal. Record, pp. 1879 to 1881, Vol. 4.

There was in 1847 no navigable channel; therefore, th corporation of the city of Washington, as we have seen passed that year an ordinance providing for the appoint ment of a committee to examine and inquire—

> "Whether or not some artificial means might no be successfully applied to induce a more favorabl direction to the current above the bridge, *tending t restore the navigation on the Washington side of the rive to Georgetown.*"

General Michler, of the Corps of Engineers, in the repor referred to on p. 119 of this brief, and dated April 30, 1868 states the shore channel had entirely disappeared.

Under the conditions convincingly established by thi testimony it is clear that in 1869 there was no boat channe from three to five feet deep and from ten to fifty feet wid along the shore, as is described in the surveyor's return t

the warrant of survey and in the affidavits which accompanied the application to rescind the disallowance of the survey, or any channel whatever, and that the flats, or socalled meadows, were either tide land or accretion to the mainland of the city, and were within the city in either case, and that the grant of land included or intended to be included in the patent was for this additional reason invalid.

The Patent Was Obtained by Fraud.

Again: The Kidwell patent is void because it was obtained by fraud, as charged in the bill. The record shows that in the circumstances which led to its issue there was a general and utter disregard of the requirements of the laws of Maryland, of the regulations which prevailed in that State in such matters, and of the rules and regulations promulgated by the Secretary of the Treasury under the Joint Resolution of 1839 (Appendix B to brief, p. 216); and that the Commissioner of the General Land Office was misled by deceptive affidavits as to the actual condition of the land for which the patent was granted.

It has been affirmatively shown by the testimony that no oath was filed, as required by said regulations, either in the Treasury Department or the Interior Department, of any of the officers named in said regulations and charged with the duty of carrying the Resolution of Congress of 1839 into effect; and, in so far as the public records are concerned, there is absolutely no evidence that any such oath was ever taken by them.

The 52d section of the Maryland Constitution required the surveyors to be sworn; they were also required to take the oath to the Government by the orders of the Governor and Council of April 15, 1782 (Kilty's L. H. A., p. 435), and also an oath of office; and by the act of April session, 1782, Ch. 38, chain-carriers were required to be sworn; by the Regulations of the Secretary of the Treasury, the

officers designated were required to take an oath "faithfully and impartially to execute" their duties. Those were not idle ceremonies; their object was to insure, and the government was under these positive requirements entitled to the performance of the official duties of the officers named, under the sanction of an oath, and to the protection which it would afford; and in a case where they have been disregarded, and where the rights of innocent purchasers are not affected, the patent should be set aside.

By the regulations established by the Secretary of the Treasury under the Joint Resolution of 1839 William Tell Steiger, Principal Clerk of Surveys, was appointed Examiner-General; that his appointment was personal is shown by the fact that he is specially mentioned by name, while the regulations in the cases of other appointments simply designate the occupant of some office by his official title only, as "The Commissioner of the General Land Office," and "The County Surveyor of the County of Washington." There is no evidence in the public records, either of the Treasury Department or of the Interior Department, to show that Stephen J. Dallas, who officiated with respect to the Kidwell grant in the important office of Examiner-General, was ever appointed to that office. William Tell Steiger was in law the "Examiner-General" at the time of the Kidwell application for a patent.

There is no evidence in the public records, either of the Treasury Department or of the Interior Department, or in the Clerk's office of the Supreme Court of the District of Columbia, to show that after the grant had been prepared for signature it was presented to any judge of the Supreme Court of the District of Columbia for approval, while the act of Maryland of 1781, chapter 20, required that it should be presented "to the Chancellor for his approbation and attestation." The testimony on this point is collated in Appendix D to this brief (p. 238).

Two applications for warrants of survey for lands in the river were made by Kidwell; one of them dated September 2, 1867, was for a warrant of survey in his favor for—

> "an island situated in the Potomac River containing fifty acres, more or less, lying between the Washington City Channel and the Swash Channel, commencing nearly opposite to Fifteenth street west and extending up to a point opposite to where D street north strikes the canal or river and as much further upstream as firm unclaimed land is found."
>
> Record, Vol. 1, p. 26.

Thereupon the Commissioner of the General Land Office issued a warrant of survey, dated September 12, 1867, and addressed to the Surveyor of Washington County in the District of Columbia, reciting the application of said Kidwell for such warrant and describing the land as in Kidwell's application. The warrant then continued as follows:

> "Lay out, therefore, and carefully survey for and in the name of the said John L. Kidwell the aforesaid fifty acres of vacant land, provided the same is a *firm land and not subject to tidal overflow.*"
>
> Ib. p. 25.

The Surveyor of Washington County returned a survey as having been made by him October 10 and 12, 1867, of a—

> "parcel of land near to and adjoining the Washington shore of the Potomac River, separated from the main land by a boat channel from three to five feet deep and from ten to fifty feet wide, extending from 25th street West to Easby's shipyard, for John L. Kidwell, according to an order of the Commissioner of the General Land Office, to me directed, dated *June 26th*, 1867; said land I have called 'Kidwell Meadows,' beginning at a cedar post firmly planted at low water on which is inscribed the letters 'J. L. K.' at a point bearing N. 84° W. from the center of the dome of the Capitol, and S. 43° 30′ W. from the center of the dome of the Observatory, and distant about one-fourth of a mile from thence by compass bearings."

The return then gives 23 courses and distances, and a last one—

> "thence in a straight line to the beginning, containing forty-seven acres and seventy-one hundredths of an acre of land, more or less, without improvements."

The only monuments mentioned in the return are the dome of the Capitol, and the dome of the Observatory, and the cedar post said to have been planted.

Ib. pages 15 and 16.

An application of Kidwell to appropriate another tract of land which he describes as—

> "A certain flat or bar in the Potomac River between the Virginia and Maryland channels and adjoining the Long Bridge on the opposite side thereof, containing about twenty acres of land, more or less,"

was made June 10, 1867, (Rec., Vol. 5, p. 69); and upon this application the Commissioner of the General Land Office issued a warrant of survey dated *June 26th*, 1867, in which the application of Kidwell for the last mentioned tract was recited, and which then continued:

> "Lay out, therefore, and carefully survey for and in the name of the said John L. Kidwell, the aforesaid fifty acres of vacant land, provided the same is a *firm land and not subject to tidal overflow.*" (Vol. V., 72);

and the surveyor returned another certificate of a survey as having been made August 28, 1867, for a tract called Kidwell's Island, "containing fifteen and twenty-five hundredths acres adjoining the Long Bridge."

Both of the certificates of survey having been returned to the General Land Office, an examination was made by Stephen J. Dallas, who assumed, mistakenly and without authority to act as Examiner-General; and in a report made

by him to ıe Commissioner of the General Land Office he states tha order to pass upon the survey—

> "u. .erstandingly, *and to see whether the surveys were executed in accordance with the terms of the warrants of survey*, it was found necessary to examine the premises, which I did in person on the 13th instant, reaching the localities on ice, in company with an employé in the Surveying Division of this office. We found the premises in both instances to be under the ice in the Potomac River, presenting no appearance of land, which the applicant, Mr. Kidwell, desired to appropriate under the aforesaid Joint Resolution of Congress.
>
> "Finding the premises to be, in both instances, *submerged and subject to tidal overflow*, and, of course, such land not fit for 'vacant cultivation,' as required by the third section of the act of November session, 1781, Chap. 20, vide Kilty's Land Holders' Assistant, page 309, it becomes my duty to reject the surveys and endorse them in each case 'disallowed,' and stating my reasons therefor.
>
> "In consideration of the foregoing circumstances connected with the application of Mr. Kidwell, and the surveys returned *in total disregard of the law and instructions embodied in the warrants of survey*, I have the honor to deliver the plats of the survey to you, with the request that you cause the applicant, Mr. Kidwell, to be notified of the rejection of the surveys made, and also the Surveyor of the County so that the latter may cancel such surveys on his records for the reasons hereinbefore stated."
>
> Rec., Vol. 1, p. 28, 29.

Under date of February 29, 1868, the Commissioner of the General Land Office notified the Surveyor of the report of the Examiner-General as to the rejection and disallowance of the surveys, saying:

> "*It was your duty under the authority of the warrants to have ascertained, if you had not been cognizant of the fact, whether or not the alleged vacant lands were subject to the tidal overflow, and not to have repre-*

sented the premises as land, which is palpably evident to be nothing but bars or flats liable to be submerged by every tide.

"As the injunctions contained in your warrants of survey has been disregarded by you, the surveys have therefore been rejected, and you are required to cancel the same on the records in your office.

"Mr. Kidwell has been advised of the decision in regard to these surveys."

Ib., 40, 41.

In the notification to Mr. Kidwell of the rejection and disallowance of the surveys, the Commissioner says:

"Upon examination made the 13th inst. of the premises, it was found that the surveys returned by Mr. Carpenter are not in conformity to the warrants, but, on the contrary, in disregard thereof, there being no land visible above the surface of the ice, but entirely submerged and, of course, *subject to tidal overflow.*"

Ib., pp. 41, 42.

Mr. Carpenter, the surveyor, was examined as a witness on behalf of the defendants, and testified, on cross-examination, as follows:

"X-Q. Did you make any inquires to ascertain whether it was subject to tidal overflow at ordinary stages of the river?

A. I think I did.

Record, Vol. 2, p. 539.

. . . . . .

X-Q. Was it he who selected the persons of whom you made the inquires?

A. No, sir.

X-Q. How where they selected?

A. I think I raised the question as to tidal overflow, and how much was overflowed, and how deep, and all that; and he said 'let us talk with some of these men around here.'

X-Q. You raised the question with Mr. Wells?

A. Yes, sir. Their idea was to have me embrace more land in my survey than I was willing.

X-Q. I am speaking of the land that you did survey, and inquiring what means you took to ascertain whether that was subject to tidal overflow.

A. They wanted me to embrace more in that return than I did.

Ib. 540.

. . . . . .

X-Q. Did you press them [*i. e.* persons of whom he inquired] to tell you how often it was overflowed?

A. No, sir; I do not know that I did. I thought from their manner, and from their talk, that they considered high tide rather higher than usual.

X-Q. What did they say on that subject?

A. They said they had seen it at high tides all overflowed.

Ib. 541.

. . . . . .

X-Q. When you went there was the tide ebbing or flowing?

A. I think it must have been ebb tide. It was nearly low tide. Ebb tide would be when it was about stationary.

Ib. 543.

. . . . . .

X-Q. Were you there when the tide was full?

A. No, sir.

X-Q. How do you know that was not under the water when the tide was full?

A. I judged from the appearance of the ground. We could see where the water had receded and where the tide ebbed and flowed. It was sorter in the middle.

X-Q. What is your idea of the difference between high and low tide at that point at that time?

A. I think it must have been from three to four feet.

Ib. 544.

. . . . . .

X-Q. When you went there the second day what was the state of the tide?

A. The same as on the first day.

X-Q. Ebb tide?

A. Yes, sir.

X-Q. What was the state of the tide when you went away—coming in, flowing in?

A. Yes, sir.

. . . . . .

X-Q. Do you remember whether the men took off their shoes and stockings and rolled up their trousers?

A. No, sir; I do not remember that the men did it. I think Mr. Crocker had on gum boots.

X-Q. Did the other men have on gum boots?

A. No, sir; I do not think the colored men did. I had a pair of long-legged boots, something like cavalry boots.

X-Q. You say the colored men kept their shoes on?

A. This thing has been twenty years ago, and I can not remember all these little instances. They might have taken them off and gone barefooted. I do not remember.

X-Q. In making this survey, did you take any means to ascertain just what point the water would reach at ordinary high tide?

A. No, sir. I took no means aside from what I judged to be low water.

X-Q. You went there at low water and judged what high water would be, and made the survey accordingly?

A. Yes, sir. I did not take any levels.

Ib. 545–6.

. . . . . .

X-Q. You say that this channel, as it went farther east, spread out into a marsh?

A. Yes, sir.

X-Q. What do you mean by that?

A. It is all water down towards 17th street. . . .

X-Q. Is your understanding of a marsh where the river is deep? Is that what you mean by marsh?

A. No, sir; I mean where this grass is growing in the water, and there was at that time, in fact, this

coarse grass. There was grass growing all over this piece five or six feet high, nearly as high as my shoulders.

. . . . . .

X-Q. Did you survey through the grass?

A. Yes, sir.

. . . . . .

X-Q. You walked around where the lines went?

A. Yes, sir.

X-Q. But what I mean is, did you walk through the interior of it?

A. I walked across it once.

X-Q. At what point?

A. Midway.

X-Q. Did you at any other time go into this grass to see what was there?

A. I do not think I did.

Ib. 547–8.

. . . . . .

X-Q. You have said that you made two soundings of the depth of the water in this so-called channel; one about 150 feet from Easby's Point, and the other 150 feet south of that. Is that correct?

A. Yes, sir; that is, more or less; the distance is now from my recollection.

X-Q. Did you make any soundings east of Twentieth street?

A. I do not know that I did, for I think that deep place which we call the "Subterranean Spring" was about there.

Ib., 549.

. . . . . .

X-Q. Did you not, for Mr. Kidwell, make a survey of another tract of land in the river and report it to the Land Office as firm land?

A. *I made another survey for him under my protest, you know; I told him that he could not get a patent for it.*

X-Q. Did you make the survey?

A. I made the survey, and returned it, containing about twelve acres, I think.

X-Q. I want to ask you whether you have had any experience as a farmer?

A. Yes, sir; brought up on a farm.

X-Q. I want to ask you, by your observation of the land included in the survey, whether it was cultivable, and whether it could be used for agricultural purposes?

A. You might grow basket-willows there. I do not know whether that is agricultural or not. You could not plow there, I do not think, with a team.

. . . . . .

X-Q. *Now, to return to the survey that you made of the tract of land near the Long Bridge; you say that you made that under protest?*

A. *I did; yes, sir.*

X-Q. *To whom did you make the protest?*

A. *Mr. Kidwell.*

X-Q. *You had received your instructions from the Land Office that it should be firm land, and not subject to tidal overflow?*

A. *Yes, sir.*

X-Q. *And you found it was not firm land, but subject to overflow?*

A. *Yes, sir.*

X-Q. *And you protested to Mr. Kidwell, and he insisted that you should go on?*

A. *Yes, sir.*

X-Q. *When you made your return to the General Land Office did you report that it was subject to tidal overflow?*

A. *I told it to Mr. Dallas.*

X-Q. *Did you mention it in your report?*

A. *No, sir.*

X-Q. *You know that Mr. Dallas is dead?*

A. *Yes, sir. He was Examiner at that time, and I had a conversation with him in regard to it.*

Ib. 550–1.

In the affidavit made by Mr. Carpenter before R. J. Meigs, then clerk of the court, on February 21, 1885, about two years before he testified, he narrates the circumstances under

which the surveys were made; and states that before making the surveys he examined both pieces from a distance—the Long Bridge in one case, and from the towpath of the canal in the other, and that at this time Mr. Wells was with him; and that he—

> "first made a survey of the land above the Long Bridge, which was the smaller piece, and that about a month later he surveyed the larger piece below Easby's Point; that deponent informed Mr. Kidwell, after the survey of the smaller piece, that in his (deponent's) opinion no patent could issue for it as there was too much overflow; and deponent afterwards understood that Mr. Dallas reported against it, and that for this piece no patent issued."

And with respect to the other, he stated:

> "That deponent never walked lengthwise the land surveyed, but walked across it at two different places, he thinks, say distant from each end about one-third of the entire length; that deponent found it to be soft mud into which the foot would sink at times ankle deep and at others over the shoe tops, except as to the west one-third, which seemed to be higher and firmer ground; that deponent has been a farmer; that the land was fit for no agricultural purposes whatever; it could not be plowed, no useful crop could be raised on it; it could not be used for pasturage; a horse could not be safely put upon it; that it was not capable of cultivation. Deponent further says that the Swash Channel was a continuation of the Washington Channel proper, and lay on the south side of the survey; that it was not available for boats of any size; that at high tide deponent thinks that flat-boats might probably have gotten along in it; that the channel along shore was nearly closed up; between the upper point of deponent's survey and Easby's Point it was not more than ten feet wide, varying from this in other places; that before making the survey deponent made inquiry of boatmen at Easby's Point as to the tides, and the land surveyed, and was informed by them that at high tide it was overflowed."
>
> Record, Vol. 2, p. 681.

From the disallowance and rejection of the surveys on February 29, 1868, until September 11, 1869, the matter remained dormant; on the latter day the applications to the Commissioner of the General Land Office were renewed on behalf of Kidwell, by his attorney, John Wilson, who in his communication to the Commissioner states:

> "When your examiner examined the land the whole country was covered with sleet, snow, and ice, as will be seen by the affidavit of John Wilson of 10th of September, 1869 (Doc. E); and hence the mistake into which he was led, and which he reported to your office."
>
> Record, Vol. 1, p. 31.

And he calls attention to an accompanying affidavit of T. Angerman (Doc. A)—

> "temporarily in command of the steamer Enterprise which sailed thro' the Swash Channel, that separates Kidwell's land from the main shore, which is the boundaries of the city" (Ib. 30);

and also to an accompanying affidavit of Henry Wells (Doc. B)—

> "who sailed thro' said Swash Channel in said steamer Enterprise on the 22nd Feby., 1869, when she made the trip above mentioned" (Ib. 30);

and to an accompanying affidavit of John Beckett (Doc. C)—

> "a respectable colored man who has known the waters of the Potomac and its tributaries intimately for twenty years, and who testifies, 24th August, 1869, to the existence of said Swash Channel for and during all that period and at the present time" (Ib. 30);

and to the accompanying affidavits of Henry Wells and John Wilson of the 10th of September, 1869 (Doc D), in regard to "Kidwell's Land," being land within the meaning of the joint resolution. Ib. 35.

John Wilson swears in his affidavit that on or about February 30, 1868, he personally examined the lands surveyed for Kidwell under the warrants, and found that they were as stated by Dallas in his report; that there was no land visible above the surface of the ice, and "that the whole city and country in the neighborhood at that time was in the same situation;" and that there had in fact been a heavy fall of snow, sleet, and rain, and a pretty severe spell of cold had frozen the same, so that the whole surface of the surrounding country was completely covered by the ice, and no land visible above it, except where the ice had been broken by travel or the land had been protected from the storm. He further states—

> "that he has frequently examined the lands so surveyed for Kidwell at other and divers times, and knows that a stray growth of weeds was upon it, and in his opinion corn and trees could have been grown upon it by ordinary cultivation."

He further states—

> "from personal examination and inquiry, that said land is not subject to tidal overflow, though at times of unusual flood, as in spring and fall rise, and by heavy rains, combined with the melting of the snow, said land may be flooded occasionally for a short period, as all other low or meadow lands are in the neighborhood, but such overflow would not, as a general rule, affect the crops at the planting, growing or harvesting season."

And he further says that—

> "he has no interest whatever in the matter, but is the attorney of Dr. Kidwell in prosecuting his right to these lands."
>
> Ib. 36–7.

The affidavit of John Wilson, which accompanied his renewal of Kidwell's applications for patents is dated September 10, 1869. The patent issued to Kidwell is dated

December 6, 1869, and among the land records of the District of Columbia is recorded a deed dated November 9, 1869, *before the patent was issued*, from Kidwell and wife to said Wilson in fee of—

> "three-eights undivided interest in and to those certain pieces or parcels of land surveyed for said Kidwell by the Surveyor of Washington County under warrants of survey issued by the General Land Office of the United States"

called "Kidwell's Land" and "Kidwell's Meadows."

Record, Vol. 5, p. 51.

The affidavit of Henry Wells states—

> "that on the 22d of February, 1869, he steamed in the steamer 'Enterprise' (a regularly registered boat plying on the waters of the Potomac) for the purpose of testing the existence of and availability for transportation, for purposes of my own, of the old 'Swash' Channel, so-called from the wharf at the foot of 11th street, west, on the Potomac, through the north draws of Long and Railroad bridges to the works at the end of 17th street wharf; then westwardly in nearly a direct line to a point close to the canal bank at the foot of 20th street; thence following the channel between the mainland and the land on the left known as Kidwell's Meadows along the shore out into the Main or Georgetown Channel at Easby's Wharf; thence to Georgetown."

He further deposes and says that the steamer passed without any difficulty or hindrance whatever through the entire channel, and that he considers it a perfectly practicable channel for the class and model of vessel with which it was tested—a fifty ton craft U. S. measurement—on ordinary tides. This affidavit is dated August 24, 1869.

Record, Vol. 1, pp. 35–6.

The joint affidavit of said Wells and Wilson which accompanied the renewal of Kidwell's application states

that on November 3, 1868, they "in company with others" went in a boat to ascertain the depth of water around the land surveyed by the County Surveyor for John L. Kidwell under warrants issued by the General Land Office; and that—

> "they left Easby's Wharf about 2 o'clock P. M. and proceeded to the northwestern end of the land, skirted along the western side of it, nearly down to the Long Bridge. We found Kidwell's Meadow, high and dry, standing out of the water from two to four feet, covered with a dense growth of weeds, wild rice, and other shrubs. The land was firm, solid and substantial, the water very shoal all around it, but gradually deepening, as we receded from it, in every direction, with a solid, smooth bottom of firm sand. We did not go around it, or attempt to do so, as the distance was too great and the time too short, but we saw a clear and well defined channel on all the other sides of it."

Deponents further say that, "they have no interest whatever in said Kidwell's claims to these lands or meadows."

Record, Vol. 1, pp. 34–5.

This affidavit was sworn to on the 10th day of September, 1869. The land records of the District of Columbia show a deed from John Wilson to Henry Wells dated November 12, 1869, before the patent was issued, conveying in fee—

> "one undivided half of three-eights interest in and to those certain pieces or parcels of land (*i. e.*, Kidwell's Land and Kidwell's Meadows) surveyed for John L. Kidwell by the surveyor of Washington County under warrants of survey issued by the General Land Office of the United States."
>
> Record, Vol. 5 pp. 54–5.

The affidavit of John M. Beckett which accompanied Wilson's renewal of Kidwell's applications is dated August 24, 1869, and in it he states that—

> "he has known the waters of the Potomac River and its tributaries for the last twenty-one years and upwards, having sailed in various crafts for that period, in every different capacity, except as captain, and being now engineer of the steamer 'Enterprise.'"

He further states that he was engineer of the said steamer "Enterprise" on the 22nd day of February, 1869, when that steamer passed along the Swash Channel, from the foot of Eleventh street, past and close to the works at the end of Seventeenth street, past and close to Braddock's Rock, near the old glass house, and into the main channel at Easby's Wharf, and to Georgetown; that when said steamer passed along said channel it was *mean and falling tide*, said channel having been staked out by deponent a few days before said steamer passed through the same; that at that time the island south and west of said channel was clearly marked and defined, and the said channel, though materially changed from its ancient condition, and especially within the last three years, still exists, and is fully competent for the navigation of vessels of the draft of the said steamer "Enterprise;" that the channel is clearly and distinctly marked, the main land and tow-path of the canal being on the right hand in going up to Georgetown, and Kidwell's Island [Meadows] being on the left hand.

Record, Vol. 1, p. 34.

Contrast the statements in this affidavit with those made in his deposition taken in the cause (Record, Vol. 2, pp. 316–334), in which he describes (p. 316) the steamer "Enterprise" as—

> "a square-built scow, with a stern paddle-wheel, forward cabin, and pilot house aft, where they stood and steered the boat;"

and in which he says she was open in the middle with a kitchen room on one end and a cabin on the other; that,

while he did not know exactly, he thought that when she was light she would not draw over twenty-three or twenty-four inches of water; and that Captain Duty one day in 1869 attempted to take the boat along up the Washington shore towards Easby's Point, and that after getting about half way he abandoned the effort, as "he was afraid he would get stuck in there and could not get out, and so he came back;" that he knew the place, but not well; that after Captain Duty had gone home, to Occoquan, Tate Angerman and himself took the boat through; that on the previous day he—

> "went up there and staked out the place where you could take high water and go through; . . . at low tide I did not think you could have gone through; there was not enough water; I am pretty certain you could not;"

that when they went through the flats were all covered with water, and that he had never heard of Braddock's Rock until about three or four months previously, when one of the Government's counsel spoke to him about it—that that was the first time he had heard of it, and that he did not know yet where it is; and that he thought the steamer "Enterprise" at the time could have steamed over the flats as well as in the channel, and *that he saw no land—no island*—between the boat and the Georgetown Channel, and that the "Enterprise" could not have gone up there loaded; that he was in the fire department when he was called upon to make the affidavit, and that all that he could swear to was that the boat had made a trip up to and by Easby's Wharf; that at the time he made the affidavit there was nothing said about Braddock's Rock, or a Swash Channel, or an old glass house, and that prior to the time the trip was made he had no knowledge of any channel along the shore; that "Kidwell's Island" was not mentioned, and that he had never heard of it; that his object in staking the channel off was to avoid old wrecks and logs which against

the steamer "might run and punch a hole in her;" that he made the affidavit at the instance of one of the gentlemen who was with him on the trip, and that it was never read to him and that he could not read or write.

Accompanying Wilson's application on behalf of Kidwell there was also a copy of a certificate of inspection by J. L. Brown, Inspector of Hulls, and Joseph Cragg, Inspector of Boilers, dated September 18, 1868. The Enrollment Certificate of the "Enterprise" from the Register's Office of the Treasury did *not* accompany the application, but was given in evidence on behalf of the United States (Record, Vol. 5, page 68); and it states that she is a "steam scow, has a scow bow and a scow head."

The affidavit of Angerman dated February 23, 1869, states that on—

> "the 22nd day of February, 1869, I proceeded in charge of said steamer ("Enterprise") from the wharf at the foot of 11th street, through the north draw of the Long and Railroad Bridges; thence following the 'Swash Channel' past and close to the works at the end of the 17th street wharf; thence past and close to 'Braddock's Rock,' on main shore (at old glass house); thence out into main channel at Easby's wharf; thence to Georgetown, without any difficulty of navigation."
>
> Record, Vol. 1, pp. 31–2.

In his deposition, which was taken on behalf of the Government, he states that he served on the steamer "Enterprise," of which Mr. Beckett was the engineer; that—

> "the 'Enterprise' was a flat-bottomed boat; I guess about twenty feet wide, and about from eighty to eighty-five feet long, perhaps a little longer,"—

of square bow and scow built; that she had a stern wheel, and when light her draft of water was about eighteen to twenty inches aft and about from four to six inches forward; that he recollected an attempted trip of the "Enterprise" along the Washington shore of the river from the

Long Bridge to Easby's Point; that he was on Galt's Wharf, at the foot of Seventeenth street at the time and saw the boat going up; that they had some parties aboard whom he believed to be a surveying party; that the name of one of the gentlemen was Wells and that he had previously conversed with that gentleman in relation to the trip; that the boat got in the mud and that she came back, and that "she did not find water enough and could not slide over; *of course she could slide over most anywheres*;" that the appearance of things in her wake indicated that she was kicking up mud and that there was very little water there and that he supposed she "was sliding over the best part of it from the way she was kicking up mud;" that he had no recollection of taking the boat up along that same course and out at Easby's Point; and being shown the affidavit made by him stated that he had no recollection of making it.

Record, Vol. 2, pp. 366–376.

Captain Duty of the "Enterprise" was examined as a witness on behalf of the Government and testified that the Enterprise—

> "was a boat with a draft of four feet when she was loaded; about 65 feet in length and I suppose 20 in width;

that she was constructed on the bottom "flat as a plank—square bow;" that she was propelled by what "we would call a wheel-barrow stern—a wheel revolved by two engines," and that her heaviest draft of water when empty was "from 18 to 20 inches" at the stern, and "from four to six inches" at the bow; that he undertook once to sail the steamer along the Washington shore of the river up to Easby's Point; that he—

> "was employed by some unknown parties. I told them that I could not make the trip through, but I told them that I would try. When I got half the

> distance through, I did not have sufficient water for risking the boat without asking the privilege of the owner of the boat, and I thought that I had better back a little, and so I swung the boat around and came out. But if there had been a little more water I have no doubt I could have gone clear through."

That at the time "she was light—nothing but the natural boat and machinery;" that when he abandoned the effort he had gotten about half way through; that the width of the channel was then about 12 feet, not sufficient to move the boat in readily; that at the time when he tried to make the trip the flats were all covered with water, and that he did not observe an island; that there was no channel there, nothing but what he would call a "gut, a drain, washing from strong water," which could not be used with advantage by vessels of the class of the "Enterprise" for regular trading purposes; that he could have navigated the "Enterprise" wherever he found water exceeding in depth 20 inches, provided it was wide enough, and that at the time he went along up this shore trying to make the trip, he did not see any land ahead of him, nor to the left of him, nor to the right of him, except the shore; the shore was the only land that he saw that day. "I could see from shore to shore across the river;" that he was to receive $25 for the trip if he had been successful, and that he never saw any change in the river front along the Washington shore from Easby's down to the Long Bridge to the time that he lost his eyesight in 1877.

In view of the showing made by the affidavits, the Commissioner of the General Land Office directed a re-examination of the proceedings by the Examiner General, and he returned another report under date of November 10, 1869, in which he says, among other things (Rec., Vol. 1, p. 39)—

> "It will be perceived that the present condition of the 'Kidwell Meadows,' as viewed in connection with the surrounding water and land, instead of, as on former occasions, in connection with the ice and

> land, is quite different. My inspection of the premises twenty months ago, surveyed from the surface of the ice covering the same, was at variance with the present one. . . . And, although the 'Kidwell Meadows' are hardly yet fit to produce successful crops of corn or garden vegetables, the land, nevertheless, is susceptible of producing fodder and affording pasture for the cattle, and, as such, requires at my hands the rescinding of the former rejection of the survey of the 'Kidwell Meadows' which I do hereby rescind."

As to the land adjoining the Long Bridge, he adhered to his former opinion.

Williams, a fellow-clerk of Dallas, and a witness examined on behalf of the Government, testifies (Record, Vol. 2, page 361–3), that subsequent to the making of this report he had a conversation with Dallas, the terms of which he gives, and from which it appears that Dallas, at the time of making his last report knew that it was untrue; and Mace, a witness also examined on behalf of the Government, testifies (Record, Vol. 2, pp. 334–6), that, after the issue of the patent, Dr. Kidwell stated to him that he had a great deal of trouble in getting the patent, and that it had cost him five thousand dollars. The records show that he paid the Government between forty and fifty dollars for the patent.

In this connection attention is again called to the various maps of surveys of the river made from time to time, before the year 1869 and afterwards, and to the oral testimony of the large number of witnesses who were examined on behalf of the Government and who gave testimony as to the condition of the flats for many years prior to 1869, and thereafter until the Government began to fill them up in 1882. The substance of the oral testimony, except as to that which has already been referred to, will be given in Appendix C to this branch of the brief (p. 219).

The foregoing would seem to conclusively establish the fact that the surveys made and returned by the county sur-

veyor were in utter disregard of the terms of the warrants, by which he was authorized to make them only in case he found the land described in them "*to be a firm land and not subject to tidal overflow,*" and that the land described in the Kidwell grant was not at the date of the warrants nor at the date of the patent such "firm land" not "subject to tidal overflow."

The deceptive character of the affidavits filed with the renewal of the application for the patents, after the rejection and disallowance of the surveys, is also conclusively shown, and a state of circumstances indicated which, we respectfully submit, justified the setting aside and annulment of the patent.

There is but one theory upon which the truthful character of the testimony of those who assert the contrary can be sustained, which is that when they made their visits to the locality the flats were bare, owing to the prevalence of strong winds, a temporary cause which would not affect the general proposition that the land was granted by mistake.

The Land Described in the Patent is Not the Land Actually Surveyed.

Finally, the evidence shows that the land which the patent purports to grant cannot be located; three monuments only are mentioned in it, and by two of them, viz, the centre of the dome of the Capitol and the centre of the dome of the Observatory, the location of the other, a cedar stake, is determined. The cedar stake has disappeared; but if it had not, and were still in the place where the surveyor placed it, it would not indicate the actual intersection of the point of beginning called for by the patent, that is—

> "a point bearing N. 84° W. from the center of the dome of the Capitol, and S. 43° 30′ W. from the centre of the dome of the Observatory, and distant one-fourth of a mile from thence, by compass bearings."

A map, "Exhibit G. P. 11" (Record, Vol. 6, bet. pages 128 and 129), was prepared by William Forsyth, the surveyor of the District, at the joint instance of counsel for the complainants and for the Chesapeake and Ohio Canal Company; this map illustrates the location and property of the canal company between Seventeenth and Twenty-ninth streets N. W. Mr. Forsyth platted upon this map from actual survey the Kidwell Meadows, according to the patent calls and from two different points of beginning; one of these points of beginning being the true, the actual intersection of the two lines, one bearing N. 84° W. from the centre of the dome of the Capitol and the other bearing N. 43° 30′ W. from the centre of the dome of the Observatory, and the other point of beginning being at the end of one-fourth of a mile from the centre of the dome of the Observatory.

He states (Record, Vol. 3, p. 937) that in order to get the actual location of the point of intersection as given by Mr. Carpenter he was compelled to obtain data from the U. S. Coast Survey Office as to the variation of the compass, and as to the length of the lines from the center of the domes of the Capitol and Observatory to their point of intersection, and that "there is no other way possible of determining Mr. Carpenter's point of beginning;" that after getting the *data* (Ib., p. 937), he made surveys on the ground and prepared the map. "The map," says he, "has been carefully prepared and verified in every way, and in my judgment is a correct plan."

The point of beginning in one instance is shown by the map to be located out in the Virginia Channel 120 feet beyond the line of reclamation, and run from this beginning the patent includes part of a public street of the city and of said Virginia Channel. As run from the other point of beginning it includes a considerable section of the city, in which is situated property belonging to the Chesapeake and Ohio Canal Company and others.

Mr. Forsyth also testifies (Ib. 938):

> "But it is quite clear that Mr. Carpenter did not get by the actual operation of the needle the bearings thus registered of the point of beginning from either of the domes. In order to do this he must necessarily have planted his instrument upon each of these domes, which of course he did not and could not have done; hence, he got these lines in some other way, and very evidently in this way: standing at his point of beginning, he pointed his instrument at the center of the dome of the Capitol and took the course registered by the compass; he then pointed his instrument at the center of the dome of the Observatory and took the course registered by the compass, and then he simply reversed these two courses. I further know that he did this from a conversation that I had with him, in which he stated to me that it was in this manner he determined his starting point. In point of fact if a stake had actually been placed at the actual point of his starting, and then the instrument had been placed on the centre of the dome of the Capitol, and the course of that point taken, and it had been then placed upon the centre of the dome of the Observatory, and the course of the point taken from that dome, the compass would not have registered the bearings which he gives. Even if the Capitol building and the dome, with their immense masses of iron, had not existed, and the instrument had been placed upon a point directly under the dome, and sighted at this supposed point and starting of the Meadows, the courses registered would not have been the same, and this on account of what is called the variation of the needle, which is different in different parts of the District. . . . This variation of the needle is due to local causes in some instances, and by causes in other instances which can only be determined by conjecture or speculation."

Mr. Forsyth states that the Charles A. Schott of the Coast Survey, who prepared the data for him, by which he was enabled to make the survey, has in the line of work

assigned to him (Schott)—"no superior in this country or out of it as a scientific man."

Mr. Schott was examined and testified (Ib. 930–935) as to the nature of his duties in the Coast Survey, and as to furnishing data to Mr. Forsyth for the survey from computations made with reference to the point of beginning given in the Kidwell Patent, that is, the point of intersection of the courses given from the centre of the domes of the Capitol and Observatory; and then said:

> "These courses from the centre of the dome of the Observatory and from the centre of the dome of the Capitol were the only things mentioned by which the point of beginning could be located.
>
> "Assuming that Mr. Carpenter's bearings from the centre of the dome of the Capitol and from the centre of the dome of the Observatory were given with absolute correctness, then by making the necessary allowance for the variation of the compass I calculated the distance and direction of the line from the Capitol to the Naval Observatory by correct data kept in the office of the United States Coast and Geodetic Survey, and took the variations of the compass likewise at the office; then solving the triangle, of which the base and two angles were given, the position of the point of beginning of the Meadows was located. These methods are absolutely correct mathematically. My method of proceeding is set out in detail in this paper which I have prepared and which shows the manner in which the computations were made to determine the point of beginning of Kidwell Meadows."

And in regard to reasons which were apparent, that the bearings from the domes of the Capitol and Observatory with reference to his (Carpenter's) point of beginning were not taken, he says:

> "The foregoing statement by me is based upon the assumption of absolute correctness in the courses

given by Mr. Carpenter from these two points. But it is quite clear that Mr. Carpenter did not take these bearings from these points on account of the difficulty, and I might say impossibility, of getting his instrument upon the centre of the dome of the Capitol and upon the centre of the dome of the Observatory, which would have been necessary for him to do in order to get the bearings of this point off the shore with precision. The Statue of Liberty was upon the dome of the Capitol prior to the year 1867, when this survey was made.

"It is also a fact that, even if he had his instrument on these points, by reason of what is known as local attraction, due to the presence of iron, the direction of the needle would have been influenced. I think it is quite clear that Mr. Carpenter arrived at these courses by pointing his compass-instrument (standing upon his actual starting point of survey) to the Capitol, and then to the Observatory, finding the course of each as registered by the instrument and then simply reversing these courses."

. . . . . .

"I find, by making a very moderate allowance of one-third of a degree, that the effect on the distance between the Naval Observatory and the starting point of the 'Kidwell Meadows' would amount to an uncertainty of thirty yards or ninety feet, one way or the other, of the calculated position—in other words, it might extend the line thirty yards or shorten it to that extent."

. . . . . .

"Q. To epitomize your testimony, Mr. Schott, it indicates that through no means known to science can the point from which Mr. Carpenter actually started this survey be exactly and correctly located from his return of that survey?

"A. That is perfectly so; it can not be done."

In rebuttal of this testimony of Mr. Schott and Mr. Forsyth, Mr. Carpenter was examined and testified on behalf of the defendants (Ib. 948–961) as to the method pursued by him in making the survey (objection being made to testi-

mony as to any method pursued by him not indicated in the patent), and on cross-examination (p. 952) he says:

> "X-Q. Suppose that the return of the survey for this patent to the Commissioner of the Land Office of the so-called Kidwell Meadows had been made by some other person than yourself, and that twenty years or more after you had been called upon to relocate the tract, what course would you have pursued in regard to it—that is, the starting point having disappeared?"

WITNESS. According to the description given in the patent?

Mr. TAGGART. Yes.

> "A. Well, I should have gone on the ground and endeavored to obtain those bearings that were given me—the contained angle; that is, the interior angle, an angle of 52° 30′; I should then have set up my instrument and kept moving it until I made those two lines, so as to give me that interior angle, and then I should have proceeded with the survey, *hit or miss*. It is an easy matter. These two lines give the contained angle of 52° 30′."

. . . . . .

And further (Ib., p. 953):

> "X-Q. When you gave the bearing N. 84° W. from the center of the dome of the Capitol you assume that that bearing, or the line of that bearing, starts at the center of the dome of the Capitol, do you not?
>
> A. Certainly I would.
>
> X-Q. And when you gave the bearing S. 43° 30′ W. from the center of the dome of the Observatory, or whenever any surveyor gives a line of that course, you assume that the bearings represent a line which begins at that point, do you not?
>
> A. It is the reading of the two lines from the same point; consequently, the changing of the reading cannot affect the bearing."

Mr. TAGGART. You are not answering my question.

WITNESS. Of course, I assume it; I could not do anything else.

"X-Q. Then your answer to my question, in regard to the bearings given in that way, is that it assumes a beginning at the point mentioned and a line projected according to the course from that point?

. . . . . .

A. Well, all conditions being the same; because I know the bearing would be subject to the abnormal condition on these flats from what it would be at the Capitol or Observatory.

X-Q. There was such a thing as a bearing in 1867, which was N. 84° W. from the center of the dome of the Capitol?

A. Yes, sir; reading from that place.

X-Q. In point of fact there was such a bearing existing at that time?

A. Yes, sir; there was.

X-Q. And, in point of fact, that bearing still exists?

A. Yes, sir; only modified by the variation.

X-Q. Modified by the variation of the compass?

A. Yes, sir. . . . .

X-Q. There was such a thing as a bearing or course at the time you made this survey of a line bearing S. 43° 30′ W. from the centre of the dome of the Observatory?

A. Yes, sir.

X-Q. And there was at the time you made that survey a point where these two bearings or courses would have intersected each other?

A. Yes, sir; and that point was where the instrument stood.

X-Q. How would you have proceeded in the matter to have located that point, simply from these two courses, your stake having been lost?

A. *It would not have been absolutely necessary to have been confined to the reading of the bearings of those lines; the bearings of those lines being given, it made the contained angle 52° 30′.* I should have set up the instrument at such a point as would have given me

the contained angle looking to the centre of the dome of the Capitol and the dome of the Observatory. *That describes the angle and locates it without reference to any bearing or variation.* And I would then note the variation and see that it agreed with what it ought to be.

. . . . . .

X-Q. (Ib., 956) You mean by that, do you not, that this point, with nothing but the description which you returned to rely upon, could not now be accurately located?

A. I doubt if it could from those two points, because the conditions are not the same.

There is undoubtedly, in the abstract, a true N. 84° W. line from the centre of the dome of the Capitol, and a true S. 43° 30′ W. line from the centre of the dome of the observatory, and a place where said lines meet; and although there is thus no ambiguity in the description, which makes the place the point of beginning of the survey, it is evident from the testimony of Mr. Forsyth, and that of Mr. Schott, and even from that of Mr. Carpenter himself, that the point, if located, would not be the actual point from which he began his survey, and that a survey from this point by the courses and distances given in the patent, would not include the land which Mr. Carpenter actually surveyed and returned to the land office.

The unofficial survey which he states (Record, Vol. 3, p. 950), that he made in March, 1870, resulted in no correction of the patent, and hence, does not relieve the predicament in which it stands. The fact still remains that the land surveyed by him is not the tract described in the patent.

A grantee—

> "can acquire by his deed only the lands described in it by metes and bounds, and with sufficient certainty to enable a person of reasonable skill to locate it."

Jones et al. *vs.* Johnston, 18 How. 155.

This is not a proceeding to reform the patent, and if it were competent for a court of chancery, in a proper proceeding, to grant such relief, it is respectfully submitted, the circumstances here exhibited would not justify it.

The Claimants under the Kidwell Patent were not bona fide Purchasers for Value without Notice.

The applications for patents had been once disallowed and rejected by the Commissioner, for the reason that the land *was not* "a firm land," and *was* "subject to tidal overflow," and the presumption is, that if he had been truthfully advised twenty months later that there had been no substantial change in the conditions, he would have adhered to his original ruling.

The defendant Wells was privy to the steps taken in connection with the renewal of the applications. The other defendants, except Morris and Edward H. Wilson, are the widow and children of John L. Kidwell, the patentee, and hold in such privity with the grantee of the patent as to be in no better position than the grantee himself would be were he now alive; and as to the defendants Morris and Edward H. Wilson, it sufficiently appears from their testimony that their acquisition of interest in the land covered by the patent was in the settlement of antecedent debts, and that no new consideration passed from them at the time.

The defendant Wells was privy to the steps taken in connection with the rescinding of the orders disallowing the applications and warrants of survey. All the defendants hold in such privity with the grantee of the patent as to be in no better position than the grantee himself would be were he now alive. The defendants, Morris and Edward H. Wilson, are the only ones as to whom any pretence can be made under the testimony that they are innocent purchasers; and, as to them, it sufficiently appears from their respective depositions that their acquisition of interest in the land covered by the patent was in the settlement of antecedent

debts, and that no new consideration passed from them at the time.

The defendant, Edward H. Wilson, testified, on cross-examination (Record, Vol. 2, p. 594), that the conveyance was made to him by his father, in consideration of one thousand dollars due him from the general business of himself and his father, the grantor:

> "X-Q. In other words, in the settlement of your accounts, you were charged with $1,000?
>
> A. Yes, sir; it was just after my return from my wedding trip. It was money that came into the firm during my absence.
>
> . . . . . .
>
> X-Q. How frequently were your partnership affairs settled?
>
> A. Generally when any fees would come in. It was father and son, you know, and different from ordinary business routine."

The witness further testified that the partnership was formed January 1, 1870, and that no accounts were kept and that fees were divided as they came in; that he was married January 10, 1872, and did not return from his wedding tour until the latter part of February of the same year; that he had heard talk of the sale of the tract to a syndicate for $1,000,000.

Record, Vol. 2, pp. 594–6.

Furthermore, in view of the fact that the various steps and proceedings taken in the case prior to the issue of the patent are matters of record, and in view of the special character of the proceedings under the act of 1839, it would seem proper to charge all the defendants with constructive notice at least of the defects and infirmities in the proceedings.

A transfer to a *bona fide* creditor by a fraudulent pur-

chaser in payment of a pre-existing debt does not vest title in such creditor.

Root *vs.* French, 13 Wend. 570.
Clark *vs.* Flint, 22 Pick. 243.
Buffington et al. *vs.* Gerrish, 15 Mass. 159.
Dickerson *vs.* Tillinghast, 4 Paige, 221.

It appears from the record that the defendant Martin F. Morris is the holder of the legal title to the entire tract of land embraced in the patent, if any title whatever passed by that patent.

By deed dated November 9, 1869, John L. Kidwell and wife conveyed to John Wilson three-eighths undivided interest in Kidwell's Meadows.

By deed dated November 12, 1869, John Wilson conveyed to Henry Wells "one univided half of three-eighths undivided interest in and to" Kidwell Meadows.

By deed of December 30, 1871, John L. Kidwell and wife and Henry Wells and John Wilson convey to Martin F. Morris one-sixteenth undivided part of Kidwell's Meadows.

By deed dated March 1, 1872, John Wilson conveyed to Edward H. Wilson "one-fourth of the undivided interest of the said John Wilson, being forty-five ten hundred and twenty fourths undivided interest" in Kidwell Meadows.

By deed dated March 12, 1873, John L. Kidwell and wife conveyed to Martin F. Morris—

> "in consideration of the sum of forty thousand dollars current money of the United States, to them in hand paid, conveyed unto the said Martin F. Morris, and to his heirs and assigns, forever, six hundred out of ten hundred and twenty-four undivided parts or shares of all that piece or parcel of ground known as Kidwell's Meadows."

By deed dated February 10, 1880, John L. Kidwell, Henry Wells, Edward H. Wilson, and John Wilson's executors, conveyed to Martin F. Morris Kidwell's Flats.

By deeds dated in April and May, 1886, Edward H. Wilson and wife, John Wilson's executors, and Henry Wells conveyed and quit-claimed their interests in Kidwell's Meadows to Martin F. Morris.

Vol. V, pp. 87–106.

The widow and heirs of John L. Kidwell, deceased, the executors of John Wilson, deceased, Edward H. Wilson, Henry Wells and Martin F. Morris are made defendants to the bill and required to answer the same, but answers under oath are expressly waived.

Vol. 1, pp. 12–13.

Defendant Morris filed his answer, and Henry Wells and Edward H. Wilson filed their pleas of "bona fide purchasers, without notice," but subsequently withdrew these pleas and adopted the answer of Martin F. Morris, *mutatis mutandis*. John Wilson's executors also adopted the answer of Martin F. Morris.

Vol. 1, pp. 62–65.

Defendant Morris, in his answer to the bill, explains why the several deeds, above recited, were made to him, and with what interest they invested him. He says—

> "in the year 1871, and in various subsequent years, he was employed by said Kidwell in his professional capacity as an attorney at law in various legal matters requiring professional service; that some of said matters were connected with said patent, but most of them had no connection whatever therewith; that for said professional service, said Kidwell requested this defendant to accept as compensation an interest in said tract of land, and he did accordingly accept such interest as compensation for his services; that said Kidwell executed and delivered to this defendant the several deeds of conveyance of said tract of land, or rather of an undivided interest therein, which, this defendant now holds."

Respondent further states that he performed professional services for the said John L. Kidwell, John Wilson and Henry Wells, in the year 1871—

> "and gave to them the legal opinion in writing, which they requested, and, as compensation for his professional services, they conveyed to him one sixteenth undivided interest in said tract of land, which was his first interest therein."

Subsequently, through several years, this defendant rendered professional services to the said John L. Kidwell, John Wilson and Henry Wells, and to the executors of John Wilson and to Edward H. Wilson, individually, in various and many matters, as well in connection with their claim of right under said patent, as also in various other matters wholly disconnected with said patent, and, as compensation for such his professional services, said parties conveyed to this defendant other and further interests, which he now holds and claims to own in his own right.

Respondent further states that in the year 1886 the parties in interest proposed to sell the Kidwell Flats to the United States; and that, in order to facilitate the conveyance of the property, he—

> "procured deeds of conveyance to himself from the said Henry Wells and Edward Hartley Wilson, and from the said Edward Hartley Wilson and Samuel V. Niles, aforesaid, as executors aforesaid, of all the outstanding interests, remaining vested in them under said patent, and as to all such interests this defendant says that he is merely a trustee and he only holds them in trust for said parties, and he prays leave to refer to said deeds of conveyance, if need be, and otherwise as may be required to manifest the amount of the several interests, so as aforesaid conveyed to him and now by him held in trust."

It appears then, that the only interests which Mr. Morris holds as trustee are those conveyed to him by the deeds of April and May, 1886, from Edward H. Wilson and wife,

John Wilson's executors and the quit-claim deed from Henry Wells; and that all the other deeds recited above conveyed to Mr. Morris the interests embraced therein in consideration of professional services performed by him for the grantors therein.

Now, the deed made on the 10th of February, 1880, from John L. Kidwell, Henry Wells, Edward Hartley Wilson, and John Wilson's executors had already conveyed to Mr. Morris the "Kidwell Flats," or at least the entire interests of each and all of the grantors therein, with covenants of warranty, for his own use and benefit, uncoupled with any trust.

The deed of 12th March, 1873, from John L. Kidwell and wife, conveyed to the said Morris six hundred out of ten hundred and twenty-four undivided parts or shares of all that piece or parcel of ground known as—

> "Kidwells Meadow in *consideration of the sum of forty thousand dollars current money of the United States to them in hand paid by the said Martin F. Morris.*"

Mr. Morris, in his answer, claims the benefit of the defence of being a *bona fide* purchaser, for value, without notice, of the Kidwell Flats.

The answer of Mr. Morris was sworn to on the 3d day of December, 1886. Subsequently Mr. Morris offered himself as a witness in his own behalf, and on the 13th of June, 1887, was cross-examined on the subject of these conveyances. (Vol. 2, p. 613.) Referring to the deed of March 12, 1873, Mr. Morris said:

> "That deed was a conveyance to me by Dr. Kidwell, alone, and his wife, partly in trust for himself and partly in consideration of services that I had then rendered to him both in this matter and in other things. The precise amount to go to me was not determined at the time, but was determined afterwards; and the interest that was coming back to him afterwards I have reconveyed to his daughter Mrs. McCahill, the deed for which is not on record."

NOTE.—The deed to Mrs. Emma McCahill is not only not recorded, but is not even acknowledged, so as to be recorded. Rec., Vol. 5, p. 106.

X-Q. At the time of the conveyance of March 12, 1873, to you, was there any writing showing the nature of the interest which you held, or of the trust upon which you took the property?

A. I gave a writing to Dr. Kidwell some time; but whether it was at the time, or afterwards, I can not now recall. My impression is that it was given afterwards.

X-Q. Do you know where that is now?

A. No.

X-Q. You did not retain a copy of it?

A. I do not think I did.

X-Q. Did you put it in your letter-book?

A. No.

X-Q. Can you recall the terms of that paper?

A. No, sir; excepting that it was to the effect that I held the property in trust for him, with such charges as there might be in my favor afterwards; I do not remember the words precisely, but they were to that extent.

X-Q. When was it that your interest in that six hundred ten hundred twenty-fourths was ascertained?

A. It was ascertained definitely when the subsequent deed was made.

X-Q. Can you give that date now?

A. Yes. The deed from all the parties, eight in number, he joining in it, was dated February 10, 1880.

X-Q. Then, as I understand you, you have held this as security for your compensation for services afterwards to be rendered; that is, the deed of March 12, 1873?

A. In part for services afterwards to be rendered; but there had been services before rendered to him, but not at all connected with this matter.

X-Q. Had there been any amount arrived at prior to the time that you held this deed of February 10, 1880?

A. No.

X-Q. Had the account been adjusted?

A. No.

X-Q. It was not until 1880 that there was any definite arrangement between you and him as to the amount for which this interest was to stand as security?

A. No.

X-Q. For what reason did he convey to you the property he held in trust for himself, or, why did he not retain the title himself?

A. Well, he had two or three reasons. In the first place, he wanted to have the appearance of a sale, the deed being absolute on its face, and it was desired to put some nominal value of some kind upon the property. There was an idea of selling it at that time; in fact, I was given to understand that there was a syndicate formed for the purpose of purchasing it. I know that I was called upon to meet a gentleman who was supposed to be acting for that syndicate, and I think that Dr. Kidwell feared at that time that he was getting into some complications.

X-Q. Pecuniary complications?

A. Yes; pecuniary complications, mainly in regard to the Seneca Company, about which he consulted me very frequently.

. . . . . .

X-Q. Then, there was, as a matter of fact, I suppose, no part of this $40,000 paid which was represented on the face of the deed to be the consideration?

A. No; there was no pecuniary consideration at all.

. . . . . .

X-Q. I do not quite understand how it was that the deed of February 10, 1880, was required to secure you, so far as Kidwell was concerned, when you at that time held six hundred ten hundred twenty fourths interest, as like security under the deed of March 12, 1873?

A. That point was considered at the very time.

X-Q. Will you explain that?

A. I remember that at the time that deed was drawn that I had the whole of the Kidwell title in me; but as he had conveyed to me partly in trust, and had a memorandum to that effect, he deemed

it best to join in this conveyance. That was the only reason.

X-Q. Did you keep an account with Dr. Kidwell in your books?

A. No, sir.

X-Q. Is there any entry made in your books at the time of your settlement to show what you charged him for particular items of service?

A. I do not think that we went into details at all at that time or any time.

X-Q. Did you at any time give receipted bills to Dr. Kidwell, or to other people interested in the Kidwell Meadows?

A. I think not.

X-Q. Do they hold any receipts so far as you know, showing payments of your demands against them?

A. I think not."

The position of "*bona fide* purchaser, for value, without notice" is one much favored in courts of equity; that court will "give no assistance against him;" it "will not take the least step imaginable against him." The defense is a bar to the exercise of the jurisdiction of the court against such purchaser. But to entitle one to these privileges he must show that he has the elements to make up the character; he must present himself to the court in such manner as will entitle him to recognition without investigation; he must wear the insignia that belong to the character he assumes.

This court has defined in some sort the manner in which a defendant who seeks the protection of this defense should present himself, in his pleadings, to the court.

In Boone *vs.* Chiles, 10 Peters, 211, it said:

> "In setting it up by plea or answer it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed; notice must be denied previous to and down to the time of

> paying the money and the delivery of the deed, and if notice is specially charged, the denial must be of all the circumstances referred to, from which notice can be inferred, and the answer or plea show the grantor acquired title."

Now, upon his answer to the bill, by which alone Mr. Morris presents his defense of a *bona fide* purchaser, must he rely for all the protection which the defense can afford him here. And, it there appears that he invokes the aid of this defense for himself in two distinct characters, viz., in his own right and as trustee for Kidwell and certain alienees from him. As to the first class, the defendant pleads as follows:

> "And such parts as he holds in his own right this defendant says that he is a *bona fide* purchaser for value, without any notice or knowledge of any defects or irregularities whatever of any kind, if any there were, which this defendant does not admit, in the title of said John L. Kidwell. This defendant had no notice of any such defects or irregularities, if any there were."

As to the second class the defendant says:

> "Upon information and belief merely he says that the interests acquired by said parties in the premises, and which by the said several conveyances became vested in this defendant, were acquired by them for a valuable consideration, in good faith, and without notice of any defect or irregularity, if any there was, in the title of the aforesaid John L. Kidwell. And, therefore, as trustee for them, this defendant prays to have the same benefit from this his answer as though he had specially pleaded such *bona fide* purchase in bar of the bill of complaint."
>
> (Vol. 1, pp. 59–60.)

The most anxious scrutiny of this answer will fail to discover any averments as to the title and possession by Kid-

well of this land at the time of defendant's purchase from him—no averment of the consideration, that it was *bona fide* and truly paid—none as to the want of notice previous to and down to the time of paying the money and the delivery of the deed. On the contrary, the averments of the answer plainly declare that all the deeds of conveyance, prior to those made in 1886, were to the defendant Morris, in his own right, and only those made in 1886 were made to him as trustee for others—that the deeds made to him by John L. Kidwell were in consideration of professional services rendered by him for Kidwell—

> "in the year 1871 and in various subsequent years; that some of said matters were connected with said patent, but most of them had no connection whatever therewith"—

that

> "subsequently, through several years, this defendant rendered professional services to the said John L. Kidwell, John Wilson and Henry Wells, and to the defendants, E. Hartley Wilson and Samuel V. Niles, as executors of the estate of said John Wilson, and to said Edward Hartley Wilson individually, in various and many matters, as well in connection with their claim of right under said patent as also in various other matters wholly disconnected with said patent, and as compensation for such professional services said parties conveyed to this defendant other and further interests, which he now holds, and claims to own in his own right."

Now, here were conveyances to him for antecedent considerations, and other conveyances which were but securities for compensation for services thereafter to be performed. The first deed from John L. Kidwell and wife, John Wilson and Henry Wells, to Morris, bears date December 30, 1871, and is in consideration of—

> "professional services rendered to them, by the party of the second part, and of one hundred dollars current money of the United States to them in hand paid,"

and conveyed to him one-sixteenth interest in the patent. The deed of March 12, 1873, was from Kidwell and wife to Morris, in consideration of—

> "forty thousand dollars current money of the United States to them in hand paid by the said Martin F. Morris,"

and conveyed to him six hundred, out of ten hundred and twenty-four undivided parts or shares of "Kidwell Meadows." But Morris admits in his deposition (Vol. 2, p. 614) that this consideration had not been paid and that the deed was but a security to him—

> "in part for services afterwards to be rendered, but there had been services before rendered to him, but not all connected with this matter;"

that the reason for reciting this large consideration was that—

> "it was desired to put some nominal value of some kind upon the property. I think that Dr. Kidwell feared at the time that he was getting into some complications — pecuniary complications, mainly in regard to the Seneca Company, about which he consulted me frequently;"

and further, "there was no pecuniary consideration at all." He admits that the amount due to him for his services was not ascertained until 1880; that he kept no account on his books against Kidwell; that when they settled they did not go into details at all; that he gave no receipts to Kidwell or to the other parties. So he did not aver in his answer what the real consideration for the grant to him was, because he did not know what it was. He did not aver "that the vendor was seized in fee, and was in possession," because that vendor had never been in possession for one instant.

The consideration of $1,000 mentioned in the deed from

John Wilson to his son Edward H. Wilson, is shown, as we have seen, by the deposition of said Edward H. Wilson to have been a sum due him from his father.

The Kidwell Meadows lay in the Potomac River, and, even in the view taken by this defendant, that the tract was not within the limits of Washington City, yet, it was within the possession of the United States, as part of the river, and was never out of their possession.

> "To entitle a man to the character of a bona fide purchaser, without notice, he must have acquired the legal title, and have actually paid the purchase money, or parted with something of value by way of payment, before receiving notice."
>
> Wormley *vs.* Wormley, 8 Wheat. 421.

> "A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled in very many of the States, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of bona fide purchase."
>
> 2 Pomeroy's Equity, Sec. 749.

But, behind all this stands the immutable fact that John L. Kidwell did never acquire the legal title to this land, because the patent under which he claimed was void and of no effect, for want of power in the officers of the Government to issue it. In 1871, when Mr. Morris was employed to exercise his professional knowledge and skill in securing the patentee, and those claiming under him, the Act of Congress of February 16, 1839, admonished him that the patent could be issued only under and in accordance with the laws of the State of Maryland for securing titles to

vacant lands. The public records admonished him that it had been already judicially ascertained by a court of competent jurisdiction, whose judgment remained unreversed, that this land lay within the limits of the City of Washington; they further notified him that the patent could convey title only to firm land, not subject to tidal overflow, and that this land was shown by the official maps in the public offices of the Government to be land not of that character, and by that kind of notice, which is notice to all the world, viz., the actual appearance and actual condition of the *locus in quo*. The palpable fraud practiced when the Commissioner of the General Land Office, to induce the execution of the powers entrusted to him, avoided and made ineffectual the acts done in the exercise of that power. Of all these things the defendant Morris had full and complete notice, and knowledge is to be imputed to him, of which he can not divest himself.

Mullan vs. *United States, 118 U. S. 271*, was a suit brought by the United States to annul the title of Mullan and Avery to certain land listed by the Secretary of the Interior to the State of California as a school indemnity selection, on the ground that when the selection was made, and when it was listed, the land was coal land, and so known to be both by the officers of the State, who made the selection, and by Mullan and Avery when they afterwards acquired the title from the State. The acts of Congress provided that lands embracing coal beds or coal fields, constituting portions of the public domain, should be not liable to preemption entry. Mr. Chief Justice Fuller, delivering the opinion of the court, said:

> "It remains to consider whether, since the land was in fact listed to the State by the proper officers of the Government, the selection can be vacated and the titles under it annulled in a suit in equity brought by the United States directly for that purpose, and about this we have no more doubt than the Circuit Court seems to have had. The lands

were, as we have seen, known coal lands. No one seriously disputes that now; and in our opinion, upon the well established facts, Mullan and Avery occupy no better position than the State would if no patent had issued to Avery. They are in every sense of the term purchasers with notice. The case is, therefore, directly within the decisions of this court in *McLaughlin* vs. *United States, 107 U. S. 526*, and *Western Pacific Railroad Co.* vs. *United States, 108 U. S. 510*, where it was distinctly held that patents to the Western Pacific Railroad Company for known mineral lands could be cancelled on a bill in equity filed by the United States for that purpose. . . . The list was certified without authority of law, and therefore by a mistake against which relief in equity may be afforded. As was said in *United States* vs. *Stone, 2 Wallace, 535*: 'The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. This is a judicial act and requires the judgment of a court.'"

Recapitulation.

It is respectfully insisted, on behalf of the United States, that upon the foregoing showing the decree below annulling the Kidwell Patent should be affirmed, because—

1. The General Land Office had no jurisdiction to issue it; the land which it attempted to grant being in the harbor of the city of Washington and part of the bed of the Potomac, a great tidal river and arm of the sea; and, hence, not land the disposition of which was contemplated either by laws of Maryland in force in the District of Columbia in 1801 or by the Joint Resolution of Congress of 1839.

2. Even if tide lands were subject to sale or disposition under laws in force in Maryland, at the time of the cession by that State to the United States, the provisions of the Act

of Congress of 1801, continuing in force the laws of Maryland, had relation only to the laws of the State affecting individuals and the property rights of individuals, and had no relation whatever to the public property of the State transferred by it to the United States.

3. The land was granted in violation of the terms of the Joint Resolution itself; it was otherwise land set apart for public purposes:

(*a*) As being originally included by the public authorities within the limits of the city of Washington; and if not then so included—

(*b*) As being, in 1867 and 1869, merely an accretion to the main land of the city and so included at that time.

4. Of fraud and misrepresentation in obtaining the patent, and, in this connection, of the failure of the officers named in the Regulations of the Secretary of the Treasury to comply with the requirements of said regulations and the laws of Maryland in the steps and proceedings which led to the issuance of the patent, and of the fact that Dallas, who acted in such steps and proceedings as Examiner-General, was simply a volunteer, without authority of law whatever, and of the fact that the Commissioner of the General Land Office was misled by the untruthful statements contained in the affidavits which were submitted to him in support of the application to rescind the disallowance of the survey.

5. Land located according to the description given in the patent would not be the land which was actually surveyed in 1867 and which it was intended to include in the patent; and,

6. None of the defendants are innocent purchasers for a valuable consideration.

APPENDIX B.

REGULATIONS UNDER JOINT RESOLUTION OF 1839.

TREASURY DEPARTMENT, *August, 1839.*

Regulations for carrying into effect a joint resolution of Congress approved February 16, 1839, "directing the manner in which certain laws of the District of Columbia shall be executed."

1st. The Treasurer of the United States is, in reference to lands in the county of Washington, charged with the duties of Treasurer of the Western Shore of Maryland, and will execute the same agreeably to the laws of Maryland in force the 27th day of February, 1801.

2d. With the modifications hereinafter contained, the Commissioner of the General Land Office, in like manner, will discharge the duties of register.

3d. The county surveyor of the county of Washington is required by the resolution to execute warrants to him directed.

4th. WILLIAM TELL STEIGER, principal clerk of surveys, is appointed Examiner-General, and will discharge the duties appertaining to said office.

5th. MATTHEW BIRCHARD, Solicitor of the General Land Office, is appointed Judge of the Land Office, for the purpose of carrying into effect said resolution.

6th. The officers hereby appointed will each take an oath before a person competent to administer the same faithfully and impartially to execute the duties appertaining to their respective offices; which oath shall be filed in the Treasury Department previous to their entrance upon duty.

7th. The forms of titlings, warrants, and other proceedings, with such modifications as the change of jurisdiction has made necessary, shall be the same as were in use in

the State of Maryland at the date of the cession of Washington; and no other substantial variation shall be allowed.

8th. The rules respecting the practical operations and mode of proceeding in the Western Shore Land Office will be gathered from the Land Holder's Assistant; and, until otherwise directed, the same will be followed as the general guide in executing the aforesaid resolution.

9th. A person wishing to appropriate land by an original warrant will, in the first place, go to the Treasurer of the United States, file his application and his affidavit setting forth that there is, according to his information and belief, such land as he desires to appropriate; that his intention is *bona fide* to secure it; and that his application is not made with the intent or desire to harrass or vex any person whatsoever; and thereupon, on payment of the money required by law, the Treasurer will issue the titling or order directed to the Commissioner of the General Land Office, requiring him to issue to, and in the name of, the person therein mentioned, a warrant, common or special, as the case may be, for the number of acres paid for as aforesaid; and if a special warrant, the Commissioner shall insert the location or description given in writing by the applicant.

10th. Applications for warrants of re-survey will be made in the first instance to the Commissioner of the Land Office, who will require an affidavit, which, in addition to the facts required to be stated in the affidavit to be filed with the Treasurer, must state the applicant's belief that he has perfect title to the tract sought to be re-surveyed, and adjoining the vacancy which is designated to be secured, and also must produce his title papers.

11th. The Commissioner will consider no application unless it be made in writing, and within the business days of the week, andduring office hours. To prevent contests about priority, he will endorse the precise hour of filing each and every application and he will file them in order of presentation, and keep a record of the same in a book to be kept for that purpose.

12th. The surveyor of Washington county will execute warrants according to law, and such instructions as he may from time to time receive from the Judge of the Land Office, and when executed, will make his return to the Commissioner, who, having registered the return, will forthwith deliver it to the Examiner-General; and if reported correct, and no caveat shall have been filed within the time prescribed by law, on proof of complete payment a patent shall be issued.

13th. Should a caveat have been duly filed, and the truth thereof sustained by affidavit of the party, the same, together with all the papers connected with the application, shall be transmitted to the Judge of the Land Office, to be heard and determined according to law.

14th. Should it be found necessary to issue instructions concerning proclamation or escheat warrants, or further instructions touching any of the above subjects, the same will be duly attended to.

APPENDIX C.

SUMMARY OF TESTIMONY OF WITNESSES AS TO CHANNELS AND AS TO CONDITION OF FLATS WITH REFERENCE TO TIDES.

The depositions of Major Hains, the engineer officer of the Army who had charge of the work of improving the flats (Rec., Vol. 2, pp. 3–39); of John B. Duncklee, civil engineer, who, under Major Hains, was connected with the work (Ib. 40–48); of Henry H. Dodge (Rec., Vol. 3, pp. 989–1001); and of William Forsyth (Ib. 935–942), have been specially referred to in the body of the brief are in addition to the witnesses whose depositions are summarized below. In all, upwards of sixty witnesses were examined on behalf of the United States and testified as to the submergence of the flats by the tides, and to the absence of any channel along the shore of the city; most of them were life-long residents of the vicinity of the flats.

James H. Dyer (Record, Vol. 2, pages 48–53), testifies that he is 54 years of age; that from 1848 until 1877 he had lived on Twenty-sixth street, between E and F streets, about 150 yards from the river; at the age of 16 years went to John Easby at Easby's Point and served his apprenticeship as ship-carpenter until 21 years of age; that at ordinary stages of the river the flats below Easby's Wharf were covered every day with the tide; that there was more water between the top of the shoal and the tow-path of the canal than there was on the shoal; could not call it a channel—it was about a foot or two deep; that at high tide he used to take his children into this channel to bathe, but there was too much mud in it at low tide; that at high tide there would be from three to three and a half feet

of water in it; that he was in the habit of gunning on the flats until the Government began to fill them up in 1882; that at high tide he went over them in a skiff, and at low tide waded in them in mud from ankle to knee deep; that he had seen cows on the flats eating the wild oats; they would partly walk and partly swim or wade over them—there was no place where they could stand on firm land and eat the oats; that when he was a small boy he had seen a boat drawing, when loaded, about three or three and a half feet of water at the old dilapidated wharf called the Old Glass House Wharf about midway between Easby's Point and Seventeenth street; that such a boat could not get there at low tide; that there was no channel there in 1867, and that a boat could not have gotten up there then drawing three feet of water; that there had never been any agricultural cultivation of the flats, and that he supposed anything growing on water at high tide could have been grown there; that the ice formed all over these flats occasionally in winter, and that he had skated over them and seen others skate over them.

James C. Pilling (Ib. 63–65), testifies that he was forty years of age, lived in Washington all his life, and was chief clerk at the Geological Survey; that he was acquainted with Mr. Carpenter, the surveyor; that he assisted him in making the so-called survey of the Kidwell Meadows in the year 1867; that witness carried one end of the chain; that the lines of the survey were run wholly in the water, and that at the corner where the cedar post was put, the initial point of the survey, he should say it was 18 inches, and that in the course of the survey the water was from 3 to 18 or 19 inches in depth; that the pegs were not driven in the usual way, because they could not have found them; that they first tried the use of pins in the survey, but that they soon had to drop that system, and the foremost chain-man would have to wait for the end-man to

come where he was before he could go on; that there was too much mud and too much water; that the land within the lines run was soft marshy soil; that there was no place where you could walk over it without sinking into it; and that he did not take any oath as chain-man on that occasion.

Charles T. Griffin (Ib. 71–74) testifies that he is 69 years of age and had lived in the neighborhood of Easby's Point since 1828, when he was 10 years old, and has been familiar with the Kidwell Meadows, that is, the flats extending from Easby's Point to 17th street, ever since he was 10 years of age and until the Government began to fill them up in 1882; that at low water, in the last ten years, there were some portions of the flats out of water, and that in ordinary weather and when there was no wind to the westward high water would cover them; that the flats were not exposed at ordinary low tide in 1867, 1868 and 1869; that in the year before they commenced improvements, in 1881, he went over them gunning in a skiff with another man; that there never was any channel, properly speaking, between these flats and the mainland; that it was a little lower in there, at the outside about 12 inches; that this depression did not extend all the way from Seventeenth street to Easby's Point; that there was a kind of elbow along by the Observatory where the two tides would meet, and one tide go one way and the other tide the other way from this drain or ditch and disappear there and then it would all become a flat surface.

William Brown (Ib. 83–89) testifies that he was 67 years of age; that he has been familiar with the river from Easby's Point to Seventeenth street from the time he was a small boy up almost to the present time; that when a boy he used to go over the river fishing and gunning and spent a great deal of time on it; that near Braddock's Rock, off the Observatory grounds, there was a deep

spot or place where he used to go in swimming; that at ordinary high tide the flats were not exposed and there was no land visible; that there was slack water about the old glass house wharf; that there never was any channel there, except from drainage; the tides run east towards Seventeenth street and west towards Easby's Point, forming a drain; that within his recollection he never knew of a navigable channel at any time around Easby's Point or around the Glass House Wharf; that the drain was in some places two or three feet wide; that when the tide was out there was but little water in it, and that while running out there would be from a foot to two feet of water in some places; that at high tide the drain would be about four feet deep.

Samuel E. Wheatley (Ib. 99–101) testifies that he was one of the Commissioners of the District of Columbia; had lived in Georgetown all his life, and was somewhat familiar with the river front from Easby's Point down to Seventeenth street, and that his knowledge extended back to 1870; that he belonged to a boat club and in evening practice in boats on the river he noticed the appearance of the shore and the flats; in the boats there would be six men with the coxswain, and in the barge eight men with a coxswain; that he rode alone in his private boat and crossed the entire marsh, that he has done this at ordinary tides; and that the flats were not susceptible of ordinary farming cultivation and could not be used at all.

William E. Cumberland (Ib. 105–108) testifies that he was 38 years of age, and had resided during his life on Water street, between Twenty-fifth and Twenty-sixth streets, in the neighborhood of Easby's Wharf; that his recollection of the river extends 20 years back; that during that time there was no channel from Easby's Point along past the Observatory grounds, nothing but a small drain that went through there; that the tide ebbed and flowed daily over the

flats; that this condition of affairs had continued as long as he could remember and down to the time that Col. Hains started to fill in there; that there never was, to his recollection, a navigable channel at any time from Easby's Point along the shore down to Twenty-second street or Twenty-first street; that he had been over them thousands of times in a skiff, gunning for reed birds, ortolans and black birds; that you could not walk over any part of them because the ground was too soft and would not hold you, and that was the condition of affairs over the entire surface from Easby's Point down to the bridge; that the flats could not be cultivated, the water would ruin the stuff put in and it would not grow; that cattle used to swim out and feed on them, wade around, that is, at the upper end of them, opposite Littlefield's Wharf; never saw a horse out on the flats, but a horse could not travel over them.

Richard E. Bannister (Ib. 118–122) testifies that he is 43 years of age and lived nearly all his life around Easby's Point; recollection of the condition of affairs along the river front extended back to about 1860; that he dumped the first load of mud on the flats when they began to fill them in 1882; that there was more water on the lower part of the flats, down by the Long Bridge, than at the part near Easby's; that at high tide they were always covered with water, and at half tide with water, and that was their condition in 1867, 1868 and 1869; that there was no channel from Easby's Point down as far as Twenty-first street or Twenty-second street; that there was a little gut or drain between the tow-path and the flats, and at very low tide it became perfectly naked; that boats which could go along this drain could cross the flats at almost any point; that there was not more than from three to six inches of water in the drain at low tide; that he had gunned and fished over the flats along about from 1870 to 1878; that he went gunning over them prior to 1869 and subsequent; that down

to the time that Col. Hains began the filling, there was no portion of the flats exposed at high tide; that in the drain there might be from three and one-half to four feet of water at high tide; that he had seen cows wade and swim out on the flats and crop the tops of the wild oats; when the tide would get very low they would sink in the mud and could not get ashore until the tide would recede; that a wharf could not have been constructed or used to any advantage at any place along the shore from Easby's Point down to Seventeenth street without being built out across the flats to the Virginia Channel.

James Cumberland (Ib. 128–132) testifies that he is 55 years old; born in the vicinity of Easby's Point, and has lived there nearly all his life; that he has been all over the river from Easby's Point and the Georgetown Channel to the Long Bridge; that down to the year 1882 no portion of the flats was exposed at high tide; that his father owned a boat drawing 15 inches of water, and that they had to wait for high tide to get into the shore; that the average rise of the tide was 3 feet, and that the depth of the water across the flats at high tide would be about 16 or 18 inches; that a boat drawing not more than 18 inches could have passed over them at high tide.

John F. Boyle (Ib. 139–142) testifies that he is 47 years old; has lived in the vicinity of Easby's Point all his life; that the only channel from Easby's Point to the Long Bridge was called a gut—a small narrow place visible only at low water; that the flats were always covered with water at high tide; that the tides met at Twenty-first or Twenty-second street and receded both ways; that no dry land could be found at high tide; that the depth in the drain along the Observatory grounds was two and a half to three feet, and at low tide scarcely any depth at all; that ordinary crops would not grow on the flats; the wild oats which grew on them would not grow on dry land.

William Lucas (Ib. 147–159) testifies that his age is 58 years; that he has lived during all his life on Water street between Twenty-fifth and Twenty-sixth; that he remembers back forty years; that from his first recollection until Col. Hains began filling the flats were covered with water at every tide; that there was no channel from Easby's Point to Seventeenth street; that the water in leaving the flats created a drain along the shore; that there was not a difference of a foot between the surface of the flats and the bottom of this drain; that there was no firm land anywhere over the flats; that they could not be cultivated; that nothing but marsh reeds, grass and wild oats grew on them; that cattle waded up to their bodies out on them and fed on them; that it was right difficult for the cattle to get in and out of the marsh.

Thomas P. Morgan (Ib. 154–157) testifies that he has lived in Washington 50 years and is now 65; that he has dredged the channel and done filling on the flats; that his knowledge of the flats goes back 40 years; that they were covered with water at high tide; that he has crossed the flats in boats; that he never measured, but supposes that at high tide there would be 30 inches of water on the flats, and that he never saw them bare at low tide.

William C. Hunter (Ib. 160–162) testifies that he served his apprenticeship with Capt. Easby; that between 1847 and the time the Government began filling the flats they would be covered with water at high tide; that there would be some water on them at ordinary low tide; that there was a little gut between the flats and the main land which in 1869 was dry at low water and not more than a foot wide.

George Cumberland (Ib. 168–172) testifies that his age is 51; that he was born at Easby's Point; that he has gunned and fished over the flats; that a skiff could

not be gotten through the drain at low tide; that he had waded over the flats when the tide was pretty low; that he did not think any of them were uncovered at high tide and that he has shoved a skiff through the weeds at low as well as high tide.

John Easton (Ib. 176–179) testifies that he had waded out on the flats at low water, sinking into the mud as deep as his knees; that there was no substantial place to walk on; that there was no channel from Easby's; that the water in the drain was about ten or twelve inches deeper than on the flats.

William G. A. Tanner (Ib. 186–189) testifies that he is 48 years of age; that before the Government commenced to fill up the flats there was no firm or dry land on them; that he used to go out in his boat to get wood and to fish and to gun on them; that he never gunned on them except in a boat; that he could not unless he waded up to his middle in mud and water; that he had never seen any channel along the shore; that the difference in the depth of the water along the shore and that out on the flats was not more than from six inches to one foot.

Arthur Heislop (Ib. 190–193) testifies that he is 48 years old and the janitor of the Analostan Boat Club, and that he lived for twenty-five in the vicinity of Easby's Point; that at high tide the water came over the flats up to the towpath of the canal; that the flats were all covered at high tide and not exposed at all, and that continued until the Government commenced to fill up in 1881–82; that he has gunned and rowed over the flats and picked up drift-wood on them; that there was a little drain along the shore with about 18 inches of water at low tide, and that the rise and fall of the tide was from 3 to 3½ feet, and that in this drain or gut there would be at high water about 4 or 4½ feet, and that it only extended from Easby's Point to Cumberland's

shop, between Easby's and the line of the Observatory grounds; that beyond that there was no difference between the ground there and out on the flats; that there was no firm land on the flats at low tide; that they afforded no foothold for man or beast, and that in crossing them one would have to wade up to his knees.

William F. Bannister (Ib. 198–200) testifies that he is 41 years of age and has lived all his life right at Easby's Point; his first recollection of things along there is between 1860 and 1865; that in his recollection the flats were always covered at high tide and no part of them exposed; that at ordinary tide one could not go out on the flats without getting up to his knees; that there was no channel from Easby's to Seventeenth street—nothing but a small drain—the depth of which at low tide would be from a foot to a foot and a half; that it varied in places, and that it was about five feet wide.

Charles Vansciver (Ib. 205–206) testifies that his age is 50; that he has lived in the vicinity of Easby's Point and the Long Bridge since 1867; that in his first recollection before the war and the time the war broke out the flats were overflowed at high tide and that continued to be their condition until the Government filled them up; that at Easby's Point at low tide there was a sort of a triangle that would be naked; but no firm or substantial ground on which a person could stand or walk readily, the condition of which was mud and water; that there was no channel at Cumberland's, there was a little drain that ran down maybe three hundred or four hundred yards from Easby's to the Observatory wall, which was made by the tide.

Joseph Loveless (Ib. 209–212) testifies that he is 56 years old; that he has lived along the river front from Easby's Point to the Long Bridge 30 years and recollects

back to 1862; that in his first recollection the flats were overflowed at high tide and they have been overflowed at high tide ever since until the Government filled them up; that part of them would be exposed at low tide and that between the flats and the main land there was a little stream; that no portion of the flats either at low tide or high tide would afford a substantial foothold; that before the Government filled them up there was no chance out there for raising corn or garden vegetables or anything of that kind; that he never knew of the existence of a wharf between Easby's Point and Seventeenth street.

Thomas Ging (Ib., 218–219) testifies that he is 31 years of age, and a boat-builder; that he has lived in the vicinity of the river front from Easby's Point to the Long Bridge for twenty-five years; that in his first recollection the flats were covered with water at high tide, and that at low tide they were nearly bare, and that in 1881–2 they were covered at high water; that there was a small drain between the tow-path of the canal and the flats, with a depth of water of from three to six inches at low tide.

Thomas Lucas (Ib., 222–226) testifies that he was born October 26, 1826, and that since his childhood he has known the condition of the river front from Easby's Point to the Long Bridge; that he recollects back to 1840 and earlier; that he never knew of a channel that could be used for ordinary commercial purposes along the Washington shore from Easby's down; that no portion of the flats was exposed at high tide; that up to the time the Government began filling, in 1881 and 1882, there was no firm land across the flats either at high or low tide; that a boat could be shoved anywhere there; the water was a little deeper along the shore than in the marsh; and that this was caused by the ebb and flow of the tide; that at high water the flats were always covered unless there were heavy northwesterly winds; that he went along there shortly after he

understood the flats had been patented, and found a man by the name of Wells with a whole lot of willows spread along the side of the tow-path; that he had a slight acquaintance with him and said: "Mr. Wells, what are you going to do with those willows?" and that Wells replied "I am going to plant them;" that Wells was up to his armpits in the little slough and when he got out on the other side of the marsh he was up to his hips and shoving the willows down trying to plant them, and when he shoved them down they would spring up and that the witness told Wells he would not be successful.

John W. Easby (Ib. 230-234) testifies that he is 68 years of age and that his occupation is that of Naval Constructor in the United States Navy; that he is the son of the Mr. Easby who conducted a shipyard at Easby's Point; and the yard was established about the year 1831; that his father built a wharf there, part of which has since been extended toward the channel; that his recollection of the river front from Easby's Point to the Long Bridge extended from about 1831 until 1861, and that his impression is that in his first recollection the mud was scarcely visible at low tide; that his impression is that at low tide a portion of the flats was visible; that he has seen cows wading out there; and that they had difficulty in pulling their legs out of the mud; the greater portion of the flats at this time was covered with water; that he recollects when the canal was being built and dug out; that the rocks were being blasted when his father was building his first ship; there was a place running along the shore which was kept open by the tide and that it was deeper than outside—a very small channel at high water, the difference in depth between which and the flats at low water would vary from 12 to 18 inches; that prior to making the tow-path of the canal the water that hugged the shore there was of a considerable depth—several feet, and that in making the tow-path and in

filling in along the shore the mud squeezed out toward the opposite shore to allow room enough for the canal; that when they put solid earth on the soft mud it pushed part of it into the river and part of it into the canal and it had to be dug out afterwards.

Thomas Blondon (Ib. 236–238) testifies that he is 64 years of age and that he had lived near Easby's, and that he recollects when Mr. Morgan commenced digging there, and that the flats then were all covered with water; that he never saw them bare at any time except in winter after a blow of heavy northwest winds; that he recollected when Mr. Kidwell was surveying the flats that he could not tell how the survey was made; that he saw them going through the marsh with their gum boots on; that they used to come into the shipyard out of the marsh pretty muddy; that they were mostly out there at low water; that they could not wade well at high water—the tide would be too much for them; that they would not be out there more than two or three hours at a time when they would have to come in.

Edward J. Byram (Ib. 240–242) testifies that he is nearly 60 years of age; learned his trade as ship carpenter and calker at Mr. Easby's, at the foot of D street; that he had lived in the neighborhood about twenty-five years; that he had worked on the flats for Mr. Morgan; that he had seen the flats bare at very low water, but that the tide ebbed and flowed over them all the time; that the tide would cover them when it was high; that in a little gut along the shore there was perhaps two feet of water at low tide.

Thomas V. Linkins (Ib. 244–246) testifies that his age was 47 years; that he has lived near Easby's Point ever since he was born; that in his first recollection the flats were overflowed at high water; that in 1869 the whole marsh was covered with water; that at low water you could

see naked places of mud, but the water would be all over them; that there was no firm land in any place where you could walk with a dry foot; that he does not recollect any wharves from Easby's Point down Seventeenth street; that the difference between the little channel and the top of the flats was from a foot to a foot and a half at low water.

William B. King (248–250) remembers when the filling commenced in 1880 or 1881, and that at ordinary high tides the flats were covered with water; that he kept out of the mud and never tried to wade out on them at low water.

James L. Easton (Ib. 251–2) testifies that he is 39 years of age; is an engineer, and lived within 75 or 100 yards from the river; first recollection of the river front was in 1867, and that at that time the water flowed over them, and that they were not exposed at ordinary low water; that at ordinary high tides there would be about four feet of water along the shore and clean out to the main river, and that along the shore in a little drain there would be from a foot to 18 inches or maybe more, and that this continued as nearly as he can recollect down to about Twenty-second street or between Twenty-first and Twenty-second.

William H. Lloyd (Ib. 254–256) testifies that his age is 47 years; that he lived within five squares of Easby's Point; that he has gunned over the flats, his first recollection of them being about 1870, and that he gunned over them from that time until Major Hains commenced to dredge; that the flats were overflowed at high tide and that at low tide there would be about a couple of inches of water over them; that the water was a little deeper along the tow-path than it was in the center of the marsh; that at high tide he supposes there was not more than three feet of water in the gut that ran along the shore, although he never measured it.

James L. Warwick (Ib. 257–8) testifies that he is nearly 56 years of age; has been a policeman for 24 years; that he lived close to the river all his life; has done duty down there for about seven years, that is, about 1871; that his first recollection of the flats was forty or fifty years ago, at which time there was plenty of water on the flats; that no portion of them was exposed at high tide, and that you could almost cross it in a boat at low tide; and that it was always a marsh covered with water at high tide until the Government commenced filling up, and with no dry places on it at low tide; that there was a place along the shore and the boys would wade across the gut, and that there was a difference between the depth of the water in the gut and on the flats of from twelve to eighteen inches.

Francis M. Byram (Ib. 262–265) testifies that he is nearly 50 years of age; that he was born on Twenty-fifth street, between I and K; that the flats would be overflowed at high tide and that when the tide was low the grass that grew on them did not have strength to hold itself up; there would be two or three inches of water there and you could not wade over them without getting your feet wet with an ordinary boot on; that there was no firm land there either at high or low tide—land that you could walk on; that there was a little gut along the shore about ten inches lower than the surface of the flats.

Levi Vansciver (Ib. 271–2) testifies that he is 44 years of age; has lived in the vicinity of the river front from Easby's Point to the Long Bridge for 26 years; that in his first recollection of the locality the condition of the flats at ordinary tide was slush, water and mud all over them, and that at no tide was there any firm land in them; that when the Government commenced to fill them up they were a marsh of water and mud and at high tide were all overflowed; that at low tide there was a little water over

them and mud and slush; that there was no channel along the shore from Easby's Point to Seventeenth street that was fit for ordinary navigation; there was a small stream of water running along there, but no channel; that in low water there was from seven to eight inches of water in this gut more than on the flats, and that there was no wharf along there from Easby's Point to Seventeenth street.

John H. Vansciver (Ib. 275–6) testifies that he is 30 years old and that he has lived in the vicinity of the river from Easby's Point to the Long Bridge for 21 years; that his recollection goes back to '70 or '72, at which time at ordinary high tides there was water all over the flats and that their condition was nothing but mud with a little water at low tides, and no firm land that he recollects; that there was a little drain along the towpath from Easby's Point toward Cumberland's boat shop, and that the bottom of this drain was about a foot or two below the level of the flats.

Lyman Austin Litlefield (Ib. 277–279) testifies that he is engaged in a wharfage, storage and steamboat business at Easby's wharf, foot of Twenty-sixth and G streets, northwest, and that he is superintendent of the Barber Asphalt Paving Company; that he took charge of the wharf at Easby's Point September 5, 1872; that the flats were then a little overflowed; that you could see them sometimes when there was a northwest wind blowing; that the rise and fall of the tide is an average of about three feet; that he does not remember anything that could be called firm land on the flats; that from Easby's Point up to Mr. John Cumberland's boat house there used to be a little creek; that the draft of Mr. Cumberland's boats was from six inches to a foot; from the wharf to the boat house was the principal channel; when you went beyond that toward the Long Bridge there was very little difference between the bottom of the creek and the surface of the flats—perhaps eight or ten inches.

Francis E. Douglas (Ib. 280–283) testifies that he is United States Inspector of Dredging; that he has been connected with the improvement of the flats since it was started, and that ever since he can remember he has been knocking around the flats—about seventeen years, and that his age is now 33; that in his first recollection the flats at high tide were covered with water, and at low tide part of them would be covered and part not; that there was no firm land there anywhere, either at high or low tide; at low tide you would have to wade; that he did not know the depth of the water along the shore.

John W. Collins (Ib. 284–286) testifies that he is 48 years of age; that his recollection of the flats goes back thirty years; that in his first recollection of the flats you could shove a skiff over them at low water; that when the Government commenced to fill you could shove a skiff over them, in some portions at low water, and over any part at high water, and that there was no firm land to be found at either high or low tide; that there were no wharves along the shore from Easby's down to Seventeenth street, except on the tow-path of the canal; never saw the channel along the shore measured and don't know anything about it.

Richard B. Boyle (Ib. 288–291) testifies that he is nearly 37 years of age and is a police officer; that he was born on the river front adjoining the Observatory and grew up there; that he remembers the flats at the beginning of and during the war, and that at ordinary high tide they were all covered with water; that at low tide part of the flats would be exposed; at low tide you could wade out a good long ways in the water of the river; that there was a little gut or drain along the shore down from Easby's, and that the difference between the bottom of this drain and the surface of the flats he should judge to be about two feet and that at low tide the drain would have but very little water in it; that at the close of the war, between the surface of

the flats and the surface of the shore at any point between Easby's and Twenty-second street there was no substantial difference except at this little depression, this gut, and as you went the other way it became shallower till finally, as he thought, after you passed Twenty-second street it just spread out into water again the other way.

William T. Garrison (Ib. 294–5) testifies that he is nearly 48 years of age; that his first recollection of the locality began thirty years ago; that he has been through there gunning, shoving skiffs and one thing and another, prior to 1869; that ever since he could remember the flats were always covered with water at high tide, and that there used to be water on them even at low tide; that he does not know the depth of water along the shore.

Charles A. Bruff (Ib. 296–7) testifies that he is nearly 30 years of age; that he has been around the river front a great deal from the time he was 4 years old until he was 15 or 16; that at high tide the flats were covered with water, with a few reeds sticking up; that at low water there were some bare places, but that he had no recollection of dry ground, and that he had been over them time and again.

Thomas J. Galt (Ib. 337–340) testifies that he is nearly 68 years of age; has lived in Washington since the fall of 1825; that he did business at what was called Galt's wharf at the foot of Seventeenth street for twelve years; that he left there in 1867; that he knew the late Dr. Kidwell; that he saw him go to the flats with some surveyor and going out in a boat around there; they were surveying the place; at this time the tide used to cover the flats every day; there was no firm land there that he ever saw; that the surveyor made the survey in boats; that he could not have gotten out of the boat because the slush and mud would be up to his neck; where he made the surveys the tide made

regularly every day; that he does not think that the flats were ever entirely bare, even at low tide; that he sent his men out on them one time for the purpose of cutting grass to make bedding for horses; that they could not get any of it as they had to use the scythe in the scows and found that that was a poor operation; that the channel never went through at Easby's; that there was a bar this side of it; that there was no navigable channel up the shore in 1867, nor after the Chesapeake and Ohio Canal Company put the canal there; that the construction of this canal to a certain extent destroyed the Swash Channel along the shore—

> "they built the tow-path in there with rubble stone and dirt; and then there was also a kind of little channel that came around and made around my wharf. . . . I would not call it a channel; of course not; it was a way that the tide made in at."

George W. Harkness (Ib. 401–406) testifies that he is 75 years old and over; had lived in Washington all his life except two years, from 1832 to 1835; that he remembers the river front from Easby's Point down to the Long Bridge since he was ten years old; that for fifty years back there have been no wharves in existence between Easby's wharf and Seventeenth street; that the Chesapeake and Ohio Canal was made within fifty years and destroyed those wharves; there was only one wharf there fifty years ago, the Glass House Wharf; that the canal was made through there about 1831 or 1832; that within the last fifty years there has been no navigable commercial channel along the shore from Seventeenth street up to Easby's Point; that fifty years ago, at extreme low tide, the flats were visible when there would be a hard northwest wind for a day or two; at ordinary tides there was water on them all the time; that down to the time the Government began to fill them up, in 1881 or 1882, they were all overflowed at high tide, and that there was water on them as well at low tide as at high tide; no firm land

except right up against the bridge a little bit, where the causeway was constructed; nothing could be cultivated out there and (p. 403–406) that after the construction of the canal wood boats could not go up along the Washington shore and there was not what you might call a channel, and that about the Observatory it was almost one continuous thing right from the shore out, and that ever since the canal was built there has been nothing like a channel between the tow-path and the flats.

James Kelly (Ib., 407–410) testifies that he is 77 years of age and that during his life he has had opportunities of becoming familiar with the condition of the river front from Easby's Point down to the Long Bridge; that the Glass House Wharf was situated at the terminus of Twenty-second street; that the construction of the canal changed the appearance of the river front, and that the old Glass House Wharf ceased to be used after the construction of the canal; that the canal cut it off from the river; that he did not remember any channel from Easby's Point to the Glass House; that up to 1881 or 1882 the flats were overflowed at high tide; at low tide sometimes it was almost dry, and that he did not think there was any substantial difference in the surface of the flats or that they were higher at any one point than another from the Georgetown Channel to the Washington Shore.

APPENDIX D.

SUMMARY OF TESTIMONY OF WITNESSES AS TO NON-RECORD OF OATHS REQUIRED BY REGULATIONS OF 1839.

Joshua B. Callahan (Record, Vol. 2, p. 346–348) testifies that he is a clerk in the Appointment Division of the Interior Department where a record is kept of all the appointments made, dismissals and commissions; that the records show that John Wilson was appointed Commissioner of the Land Office September 16, 1852, and that he served until August 8, 1855; that the records also show that Stephen J. Dallas was appointed a clerk January, 1851; that he was appointed Principal Clerk of Surveys in the General Land Office March 15, 1859; that he was reduced to a clerkship November 1, 1862, and on January 1, 1866, became Principal Clerk of Surveys again; that this was a temporary commission issued during the recess of the Senate, and that he was permanently commissioned January 24, 1867, and that he died February 16, 1883, at 6 o'clock a. m., while in office; and that after a careful search in the records of the Appointment Office of the Interior Department he found nothing indicating that any change had been made in the appointments of the officers mentioned in the Regulations of the Secretary of the Treasury of August, 1839.

Emily Smith (Ib., 384–5) states that she is employed in the Mail and Files Division of the Office of the Secretary of the Treasury; that by direction of Hermann Kretz, who is in charge of that division as chief officer, she made a search among its records with a view to ascertaining whether any changes were made in the Regulations of the Secretary of the Treasury of August, 1839, either in respect

of the officers appointed by them or the directions contained in them, and that she found no change whatever.

Patrick Flynn (Ib. 386) testifies that he is a clerk in the Appointment Division of the Treasury Department, the duty of which is to make all appointments and removals by direction of the Secretary of the Treasury; that said division contains the record of all appointments and removals since 1861, and that by direction of the chief of the division he had made a search for appointments held by one Stephen J. Dallas under a commission by the Secretary of the Treasury, and that he found two appointments—one in the office of the Auditor of the Treasury for the Postoffice Department, in 1845, and the other as a clerk in the office of the Register of the Treasury in 1849, and that he found no appointment of said Dallas as Examiner-General by the Secretary of the Treasury under the Resolution of Congress of February 16, 1839.

Hermann Kretz (Ib. 389) testified that he was chief of the Mail and Files Division of the Secretary of the Treasury's office; that he had instituted or caused to be instituted a search among the records of the division, with a view to ascertaining whether changes or modifications in the regulations of the Secretary of August, 1839, had been made and that he had found no change, either in regard to the appointment of officers named in the regulations, or to other matters contained in them; that the search also extended to the ascertainment whether the officers mentioned in these resolutions ever filed any oath of office, and that no such oaths had been found.

Samuel Wallace (Ib. 392) testifies that he is Files Clerk in the Treasurer's office, and that at the instance of the United States District Attorney he had instituted a search for the purpose of ascertaining whether there was on the files of his office a letter from John L. Kidwell addressed to the Treasurer of the United States and dated September

2, 1867, which was accompanied by another paper signed by O. E. P. Hazard, and that he did not find on said files such, or any reference to such paper; and that he had also instituted a search among the files of his office for oaths of office of the persons mentioned in the regulations of the Secretary of the Treasury, and that he did not find such oaths, nor did he find any such oath of Stephen J. Dallas. (Ib. page 399.)

Return J. Meigs, Jr., (Ib. 396) testifies that he is Assistant Clerk of the Supreme Court of the District of Columbia; that he has examined the minutes of the Chancery branch of that court from 1867 for any action of the judge holding the court on a draft of a grant or patent from the United States to one John L. Kidwell for certain lands in the Potomac River, and that he had found nothing of the kind.

James Edmund (Ib. 411) testifies, among other things, that he was a clerk in the General Land Office and had charge of the papers relating to patents for land in the District under the resolution of Congress of 1839, and that he had searched among the records in his office and had found no oaths of the persons named in the Regulations of the Secretary of the Treasury, and that he knew that there had been no changes made in said regulations in the appointment of new officers, and that there was no appointment under these regulations of Stephen J. Dallas as Examiner-General; that there was no evidence that the draft of the Kidwell Patent had ever been submitted to any judge of the Supreme Court of the District of Columbia for approval and attestation.

Richard G. Dove (Ib. 437) testifies that he is in charge of the Secretary's files in the Record and File Division of the Treasury Department; that he had made a search for oaths of the persons named in the Regulations of the Secretary of the Treasury of August, 1839, and that he had found no such oaths.

CLASS 3.

The Claims of the Chesapeake and Ohio Canal Company to Riparian Rights Between Easby's Point and Seventeenth Street West.

The defendant, the Chesapeake and Ohio Canal Company, sets forth in its answer the incorporation of a certain company known as the Potomac Company by the Maryland Act of 1784, chapter 33, and an act of Virginia, passed in October, 1784, for the purpose of extending the navigation of the Potomac above tidewater to the highest practicable place on the north branch of the said river; and avers that under said acts (Record, Vol. 1, p. 70)—

> "the said Potomac Company acquired a continuing right to the use of the bed of the Potomac River between tidewater and the north branch of said river, and the waters of said river, and all riparian rights necessary for the sufficient use of the powers granted by said acts;"—

and that by the Virginia Act of January 27, 1824, and by the Maryland Act of December Session, 1824, chapter 79, and by the Act of Congress of March 3, 1825, the Chesapeake and Ohio Canal Company was incorporated—

> "for the purpose of constructing a navigable canal from the tidewater of the river Potomac, in the District of Columbia, to the mouth of Savage Creek, on the north branch of the Potomac River, and extending thence across the Alleghany Mountains to a convenient point on the navigable waters of the Ohio River."

The answer further avers that by section 13 of the Virginia act of incorporation it was provided—

> "that whenever the Potomac Company should declare its assent to the provisions of said act in the manner provided by that act, it should be lawful for the said company to surrender its charter and convey in due form of law to the Chesapeake and Ohio Canal Company, your petitioner, all the property, rights, and privileges by it owned, possessed and enjoyed under its charter; and for the said Chesapeake and Ohio Canal Company to accept such surrender and transfer, and to hold, possess, use and occupy all the said property and rights in the same manner as the said Potomac Company could have held, possessed and occupied the same by law; and it was further provided, that upon such surrender and conveyance, the charter of the said Potomac Company should be vacated, and all the rights and powers granted to the said Potomac Company should be vested in the said Chesapeake and Ohio Canal Company."

It is further averred that the Potomac Company assented on May 16, 1825, to the provisions of said act; and that said company on August 15, 1828, executed a surrender of its charter and conveyed all of its property, rights and privileges, under its charter, to the said Chesapeake and Ohio Canal Company, and that said surrender and transfer was accepted by the said Chesapeake and Ohio Canal Company on September 17, 1828.

And that (par. 8) under said acts of Virginia, of Maryland, and of Congress, and under said surrender and transfer, the defendant company—

> "acquired and was and is possessed of a continuing right to use the Potomac River and the full natural flow of the waters thereof, and all riparian rights to it belonging as the owner of ground bordering on or in said Potomac River *within the entire geographical limits defined by the charter of said Potomac Company*, and also *within the entire geographical limits defined by the charter of this defendant.*"

It is averred in the 9th paragraph of said answer that—

> "by an act of the General Assembly of Virginia, passed on the twenty-seventh day of February, in the year eighteen hundred and twenty-nine, it was declared that *whenever it might be necessary to form heavy embankments, piers, or moles at the mouths of creeks or along the shores of the Potomac River for the basins and other purposes of this defendant*, and the president and directors of this defendant might deem it expedient to give greater strength to the same by widening them and constructing them of the most solid materials, *the ground so formed for such useful purposes might, when so improved, be sold or let for terms of years*, as said president and directors might deem most expedient for this defendant, on such conditions as might direct the application of the proceeds thereof to useful purposes, and at the same time repay the necessary expense of the formation of such embankments, piers, or moles, provided such power was in no case exercised so as to injure the navigation of the canal."

In the tenth paragraph it is averred that in said last mentioned act of February 27, 1829, it was provided that said act should be in force as to the section of the canal east of Cumberland, in Maryland, on its receiving the assent of the Legislature of Maryland and of Congress; that the Legislature of Maryland assented thereto by act of December session, 1832, chapter 291, section 2, and Congress by the act of 1837, chapter 51, section 1; and (par. 11) that the company at a meeting held June 26, 1828, adopted with inconsiderable variations for the purpose of the construction of their canal the route surveyed by the United States Engineers, and by Messrs Geddes and Roberts which had been communicated to Congress.

Paragraph twelve of the answer is as follows:

> "12. That under the charter of this defendant it had a right to make its canal from any point or part of the tidewater in the District of Columbia, and

that in the exercise of this power the route and site surveyed as last above mentioned were extended to the basin at Rock Creek, at which place a mole, one thousand feet in length and one hundred and sixty feet in breadth, was constructed at a very large cost by this defendant, and from thence said route and site were extended to the mouth of the Tiber at or near the foot of Seventeenth street in the city of Washington, where a basin and pier were constructed, and which said basin at the mouth of the said Tiber thereby became the beginning point of this defendant on tidewater in the District of Columbia."

In paragraph 13 it is averred that the plan for said extension was adopted by the company, and that up to June 1, 1836, near half a million dollars had been expended by the defendant in constructing the canal through Georgetown and Washington to the said Tiber Basin.

Paragraphs 14 and 15 are as follows:

"14. That this defendant is informed and believes that the said extension of the said canal was so constructed from the basin of said canal at Rock Creek, in the District of Columbia, at or near the intersection of north G street and Twenty-seventh street west, in the city of Washington, to a point on the east side of Seventeenth street, in the said city, along the line marked out and defined in an original drawing in the 'Peter Force Collection' in the archives of the United States in the Congressional Library of Washington, in said District, a certified copy of which, marked 'Chesapeake and Ohio Canal Co.'s Exhibit No. 1,' is hereto annexed, and which this defendant prays may be made a part of this its answer."

"15. That, as appears by said plat, *a portion of said canal*, extending from a point west of Twenty-sixth street, in the city of Washington aforesaid, to a point about midway between Twenty-third street and Twenty-second street, in said city, *was made by* this defendant in the Potomac River between *embankments constructed in said river, with space for a tow-path, under the general powers of this defendant,*

conferred by its charters as hereinbefore mentioned, and under the authority of the said acts of Virginia, Maryland, and of the Congress of the United States, last hereinbefore referred to; and that *another part of said canal*, beginning near the west side of Twenty-first street, in said city of Washington, and extending some distance east of the east side of Twentieth street, in said city, *was also made in the Potomac river, between embankments constructed in said river with space for a tow-path, under the authority of the charters* and acts last aforesaid referred to; and that a *further portion of said canal*, beginning at a point a little west of the west side of Eighteenth street, in said city of Washington, and extending to the east side of Seventeenth street, in said city, *was also made in the Potomac* river, between embankments constructed in said *river with space for a tow-path, under the authority of the charter* and acts hereinbefore last referred to. That this defendant *became*, under the authority of the act of the General Assembly of Virginia, hereinbefore referred to, and which said act was assented to by the General Assembly of Maryland and by the Congress of the United States as aforesaid, and accepted by this defendant, *the owner in fee-simple of all such embankments by it erected as aforesaid between the basin of said canal at Rock Creek, at or near the intersection of north G street and Twenty-seventh street, in the city of Washington, and the east side of Seventeenth street, in said city*, with power to sell or lease the same, provided that in so doing it did not injure the navigation of its said canal. And that *the right and title to all parts or parcels of the land not covered by the waters of the Potomac river used in the construction of said canal or its works* between the intersection of north G street and Twenty-seventh street and the place of beginning of the canal of this defendant, at the basin at the foot of Seventeenth street, in the city of Washington, *together with all appurtenances and riparian rights to the same respectively belonging*, were acquired as the absolute estate and property of this defendant, in perpetuity, by grants or deeds made to this defendant, or by the exercise of its chartered right

of eminent domain. And this defendant will produce and file copies of said deeds or inquisitions so vesting said respective properties in it, if the same are required, and prays that the same, when so filed, may be taken as parts of this its answer."

In the 16th paragraph of the answer it is averred that under the power given by the Virginia Act of February 27, 1829, the Maryland act of December Session 1832, chapter 291, and the act of Congress of 1837, chapter 51, section 1, the defendant was authorized to construct and did construct a gate-house at the foot of Seventeenth street and a pier embankment or mole at the foot of Seventeenth street, as shown in said plat marked "C. and O. C. No. 1"—

> "and that said gate-house and the made land appurtenant thereto and part or all of the said pier embankment or mole at the foot of 17th street as the same now exists are the property of this defendant.

The residue of the answer is as follows:

> "17. That the said defendant, the Chesapeake and Ohio Canal Company, *under and by virtue of the grants of property in the embankments by it constructed as aforesaid in the river Potomac as aforesaid*, by and under the Virginia acts of February 27, 1829, and said Maryland act of 1832, chapter 291, and the act of Congress of 1837, chapter 51, *became also entitled to and possessed of the same right of property in the alluvium attaching to and accretions made to the embankments referred to in the twelfth and thirteenth paragraphs of this answer to the full width and extent of such alluviums and accretions to such respective embankments*, and in the alluvium and accretions to all its other properties within the limits defined by the third paragraph of the complainant's bill, which it originally possessed in said respective embankments and respective properties.
>
> "18. That all of the rights of property claimed by this answer for this defendant, and affected by the improvements of the Potomac river proposed to be

made by the United States, are within the boundaries defined by the third paragraph of the bill of complaint in this case.

"19. And this defendant claims the value of its right, title, interest, or claim in or to all land or water or rights within the limits defined in the third paragraph of the bill of complaint in this cause, or which may be otherwise claimed to be within the purview of the jurisdiction of this court in this cause."

No Rights of Defendant, as Successor to the Potomac Company, Affected by the Improvements of the Flats.

The Acts of Virginia of October, 1784, and the Act of Maryland of November session, 1784, chapter 33 (Kilty's Laws of Maryland), incorporating the Potomac Company, are in substantially the same terms.

The preamble of each recites:

"Whereas *the extension of the navigation of the Patowmack River, from tidewater to the highest place practicable on the north branch*, will be of great public utility, and many persons are willing to subscribe large sums of money to effect so laudable and beneficial a work, and it is just and proper that they, their heirs and assigns, should be empowered to receive reasonable tolls forever, in satisfaction for the money advanced by them in carrying the work into execution, and the risk they run; and whereas it may be necessary to cut canals, and erect locks and other works, on both sides of the river, and the Legislatures of Virginia and Maryland, impressed with the importance of the object, are desirous of encouraging so useful an undertaking."

By the fourth section of each act it is provided that the company—

"shall have full power and authority to agree with any person or persons, in behalf of the said company, to cut such canals and erect such locks and perform such other works, as they shall deem necessary, *for open-*

ing, improving and extending the navigation of the said river above tidewater to the highest part of the north branch to which navigation can be extended."

By the 9th section it is provided—

"that for, and in consideration of the expenses, the said proprietors will be at, not only in cutting the said canals, erecting locks and other works for opening the different falls of the said river, and in improving and extending the navigation thereof, but in maintaining and keeping the same in repair, the said canals and works, with all their profits, shall be and the same are hereby vested in the said proprietors, their heirs and assigns, forever, as tenants in common, in proportion to their respective shares, and the same shall be deemed real estate and be forever exempt from payment of any tax, imposition or assessment whatsoever; and that it shall and may be lawful for the said president and directors, at all times hereafter, to demand and receive, at the nearest convenient place below the mouth of the south branch, and at or near Payne's Falls, and at or above the Great Falls of the river Patowmack, and every of those places separately, for all commodities transported through either of them respectively, tolls according to the following table and rates, to wit," etc.

By the Act of Maryland of 1797, Chap. 93, the Company was authorized to receive tolls on all articles transported through the locks at the Little Falls.

By the 10th section of the acts of incorporation it was declared that the river, upon the completion of the works, shall forever thereafter be esteemed and taken "to be navigable as a public highway," etc.

The 11th section gave the Company power to acquire by purchase or condemnation such quantity of land as might be necessary for its purposes.

The 13th section, after reciting that the possessors of some situations, through which it may be necessary to con-

duct said canal, may design to improve the same for erecting mills, forges, and other water works, declares that it is the intention of the act, "not to interfere with private property, but for the purpose of improving and perfecting the said navigation," and then provides "that the water, or any part thereof, conveyed through any canal or cut made by the said Company, shall not be used for any purpose but navigation," without the consent of the proprietors of the land through which the same shall be led.

The termination of the canal built by the Potomac Company around the Little Falls was "at a point in tidewater called the Old Locks, two miles *above* Georgetown."

In the year 1821 Maryland and Virginia provided for the appointment of a joint committee—

> "to examine the affairs of the Potomac Company, the state of the navigation of the river Potomac, its susceptibility of improvement, and to make report whether the said company had complied with the terms of its charter, granted by the two States, and its ability to comply within a reasonable time; and whether any, and what, aid should be given to the said Company, and what would be the best means of effecting an improvement in the navigation of the said river."

This committee reported that they,—

> "upon full consultation, do not deem it prudent or expedient to give further aid to the Potomac Company; the only alternative, therefore, that remains is to divest them of their charter and adopt some more effectual mode of improving the navigation of the river; nor can this procedure be regarded as harsh when duly considered; the law and justice of it, it is presumed, have been made manifest. Will it be an injury to the stockholders? Look at the exposition of their affairs furnished by the Company itself; see the annual amount of their tolls; and in the present defective state of their navigation, which they have no means of improving, can it ever be

> increased? Deduct from it the expense of repairs and contingencies, as salaries to clerks and toll gatherers, and then compare it with the amount of their debts, or even the annual interest of those debts, and visionary indeed must be that man who can expect ever to draw a cent of profit from such stock with such resources. Can such debts ever be redeemed? The fact is, the Potomac Company are precisely in the situation of all other chartered companies, who fail in their undertakings; their expected profits have eventuated in loss and disappointment."

The committee discussed in their report the present state of the navigation, the inconveniences of lock and dam navigation, and the general advantages of canal or still-water navigation, and recommended a canal of the latter description. (Exhibit C. & O. C. C., No. 4.)

This report led to the passage of an act by Virginia, on January 27, 1824, incorporating the Chesapeake and Ohio Canal Company, which act was accepted, assented to and confirmed by an act of Maryland passed December session, 1824.

The preamble recites that—

> "whereas, a *navigable canal from the tide water of the Potomac river, in the District of Columbia, to the mouth of Savage Creek*, on the north branch of said river, *and extending thence across the Allegheny Mountains*, to some convenient point of the navigable waters of the river Ohio, or some one of its tributary streams, to be fed through its course, and on the east side of the mountain, by the Potomac and the streams which empty therein, and on the western side of the mountain, and in passing over the same, by all such streams of water as may be beneficially drawn thereto by feeders, dams, or any other practicable mode, will be a work of great profit and advantage to the people of this State, and of the neighboring States, and may ultimately tend to establish a connected navigation between the eastern and western waters, . . . and whereas it is represented to this Gen-

eral Assembly that the Potomac Company are willing and desirous that a charter shall be granted to a new company, upon the terms and conditions hereinafter expressed; and that the charter of the present company shall cease and determine."

The act then provides (section 2), that so soon as the Legislatures of Maryland and Pennsylvania, and the Congress of the United States, shall assent to its provisions, and the Potomac Company shall have signified their assent to the same, three Commissioners shall be appointed by the Executives of the said States, on the part of each State, and by the President on behalf of the United States, who shall receive subscriptions to the capital stock of the Company (six millions of dollars in sixty thousand shares of one hundred dollars each), which subscriptions may be paid either in legal currency of the United States or in stock or debts of the said Potomac Company; and that (section 3), whenever one-fourth or more of the said stock shall have been subscribed, the subscribers may meet and elect a president and directors.

By the 4th section of the charter the Company is empowered to agree with—

"any person or persons, on behalf of the said Company, to cut canals, erect dams, open feeders, construct locks, and perform such other works as they shall judge necessary or expedient for completing the canal hereinbefore mentioned and described."

The 9th section is as follows:

"That for, and in consideration of the expenses the said stockholders will be at, not only in cutting the said canal, erecting locks and dams, providing aqueducts, feeders, and other works, and in improving and keeping the same in repair, the said canal and all other works aforesaid, or required to improve the navigation thereof, at any time hereafter, with all their profits, subject to the limitations herein provided, and to none other, shall be, and the same are

hereby, vested in the said stockholders, their heirs and assigns, forever, as tenants-in-common, in proportion to their respective shares, and be forever exempt from the payment of any tax, imposition, or assessment, whatsoever; and it shall and may be lawful for the said president and directors, at all times, forever hereafter, to demand and receive, at such places as shall hereafter be appointed by the president and directors aforesaid, tolls for the passage of vessels, boats, rafts, produce, and all other articles, at such rates as the said president and directors may hereafter allow and establish, according to the provisions of this act."

The 15th section of the act, after reciting—

"And whereas it is necessary for the making of the said canal, locks, dams, ponds, feeders, and other works, that a provision should be made for condemning a quantity of land for the purpose,"

provides that it shall and may be lawful for the president and directors—

"*to agree with the owners of any land* through which the said canal is intended to pass *for the purchase and use and occupation thereof*; and in case of disagreement, or in case the owner thereof shall be a *feme covert*, under age, *non compos*, or out of the State or county, to obtain a warrant from any justice of the peace, directed to the sheriff, to summon a jury to 'value the land;' and all damages the owner thereof shall sustain by cutting the canal," etc.

It is further provided by the section that—

"*upon every such valuation* the jury is hereby directed to describe and ascertain the bounds of the land by them valued, and the quality and duration of the interest in the same required by the said Company for its use, . . . and on payment thereof, the said company shall be *seized* of such land *as of an absolute estate in perpetuity*, or with such less quantity and duration of interest or estate in the same, or subject to such partial or temporary appropria-

tion, use, or occupation, as shall be required and described, as aforesaid, as if conveyed by the owner to them."

The 21st section reserves to the United States—

"the power to extend the said canal in or through the District of Columbia, on either or both sides of the river Potomac."

The stockholders of the Potomac Company at a general meeting in Georgetown, July 10, 1828, unanimously resolved:

"that the assent and approbation of the Potomac Company is hereby given expressly to each and all of said acts so far as the same may be deemed necessary to the validity or future operation of each and all of said acts, in as full and perfect manner as if each and all of said acts were herein specifically enumerated and recited."

The deed of surrender from the Potomac Company to the Chesapeake and Ohio Company and its acceptance followed; the deed is dated August 15, 1828, and by it the Potomac Company transfers and surrenders to the Chesapeake and Ohio Canal Company, and to their successors, forever—

"the charter of the said Potomac Company, and all the property, rights, and privileges, by them owned, possessed, and enjoyed, under the same."

Exhibit C. & O. C. C. No. 2, pp. 50–3.

The canal of the Potomac Company around the Little Falls was terminated on tidewater two miles above Georgetown, and, consequently, no right acquired by the Chesapeake and Ohio Canal Company under said legislation and said deed of surrender to a—

"continuing use of the bed of the Potomac River between tidewater and the north branch of said river,"

or to the "waters of said river," or "to any riparian rights" of the said Potomac Company, could possibly be affected in any way by "the improvement of the Potomac River and its flats," under the legislation of Congress, several miles below.

Defendant is not a Riparian Owner as Claimed.

It is equally clear that no property right of the Chesapeake and Ohio Canal Company, depending otherwise upon its charter, has been in any manner affected by said improvements, except as to a small strip of land shown on the map "Exhibit U. S. 55" (Rec., Vol. 7, bet. 2640 and 2641), the value of which, as determined by the court below, is $353.33. Record, Vol. 7, p. 2713.

The object of the incorporation of the Chesapeake and Ohio Canal Company was the construction of "a navigable canal from the tidewater of the river Potomac, in the District of Columbia," westward until it should finally reach the navigable waters of the river Ohio. The terms of its entrance into the District of Columbia, and its powers, privileges and property rights therein, are, of course, to be determined by the legislation of Congress.

Congress by an act approved March 3, 1825, (Davis' Laws 409), provided—

> "That the act of the Legislature of the State of Virginia, entitled, 'An act incorporating the Chesapeake and Ohio Canal Company,' be, and the same is hereby, ratified and confirmed, *so far as may be necessary for the purpose of enabling any company* that may hereafter be formed, by the authority of said act of incorporation, *to carry into effect the provisions thereof* in the District of Columbia, within the exclusive jurisdiction of the United States, *and no further.*"

By the third section of the act of Virginia of February 27, 1829, it is declared:

> "That whenever it may be necessary to form heavy embankments, piers or moles at the mouths of creeks

> or along the river shore for basins and other purposes, and the president and directors may deem it expedient to give a greater strength to the same by widening them and constructing them of the most solid materials, the ground so formed for such useful purpose may by them, when so improved, be sold out or let for terms of years, as they may deem most expedient for the company, on such conditions as may direct the application of the proceeds thereof to useful purposes and at the same time repay the necessary expense of the formation of such embankments, piers or moles; *provided*, that this power shall in no case be exercised so as to injure the navigation of the canal."

This act of Virginia, according to its own terms, was to be—

> "in force so far as relates to the eastern section of the canal *on its receiving the assent* of the Legislature of Maryland and *of the Congress of the United States*, and shall be valid as relates to both sections on its receiving the further assent of the Legislature of Pennsylvania."

Eight years elapsed after the passage of this act before it became operative as a law by the assent thereto of Congress. The act of Congress by which it was "assented to and approved" was not passed until March 3, 1837. (5 Stat. 197.)

In the meantime the canal had been constructed through the City of Washington, and was in operation from Rock Creek basin to the basin built by the city at the foot of Seventeenth street. It is not claimed in the answer, nor is it shown by the testimony, that any "embankments, piers, or moles" were constructed on the route of the canal through the city of Washington since the passage of the Act of Congress of March 3, 1837. No rights of any kind were, therefore, acquired under said act along the portion of the route of the canal within the said city.

The Chesapeake and Ohio Canal Company extended its canal through Washington in accordance with the *plan of*

the city; and whatever property rights of individuals it acquired through purchase or condemnation, and whatever privileges were allowed it by the United States, were acquired by it with reference to that plan. That this was fully understood by the company is shown by the plat filed as Exhibit C. & O. C. C. No. 1 with their answer (Vol. 1, between pp. 76 and 77), and which plat shows a section of the plan of the city through which the canal was extended. It is further shown by the plat Exhibit G. P. No. 11, given in evidence by the company (Record, Vol. 3, p. 984), which is a section of the same plan from which Exhibit C. & O. C. C. No. 1 was prepared. Exhibit G. P. No. 11 shows the actual location of the bed of the canal between Rock Creek and Seventeenth street, and varies slightly only from the route originally proposed as shown in Exhibit C. & O. C. C. No. 1.

It has already been shown that the Engraved Plan of Ellicott of 1792 became the plan of the city, and that in the operations of the early Commissioners of the city, and of those who succeeded them, this plan was their guide, and that their operations were addressed to the laying down of this plan on the ground, and that in doing so not only the lands which passed by the conveyances to Beall and Gantt, and which lands were subject to the trusts declared in them, were used, but also that the shores and beds of the Potomac and Eastern Branch were used; and that the subsequent plans, namely, the Dermott Plan of 1797, and the King Plan of 1803, represented the progress which had been made in that line; that at first the surveys stopped at the shore, but were subsequently extended into the river in outlining the squares situated between Seventeenth street and Twenty-seventh street, the route of the canal. The Dermott map and the King Plan each show the location of the water line at the time of their date.

The map "Exhibit G. P. No. 11," (for which see Record, Vol. 6, next after p. 128), shows the canal's location on a section of the King Plan of the city; it also shows the row

of sycamore trees along the tow-path of the canal, and the tide line in 1803, as indicated on said King Plan.

The map filed with the answer of the Chesapeake and Ohio Canal Company, and subsequently given in evidence and marked as "Exhibit C. and O. C. C. No. 1" (for which see Record, Vol. 6, next before page 129), is a section of the King Plan of 1803 upon which is deliniated the line of the canal from Twenty-seventh street west to Seventeenth street west and into the basin constructed by the city of Washington at the mouth of Tiber Creek. The squares are not numbered on this section of the King Plan, but upon "Exhibit G. P., No. 11," which is also a section of the King Plan showing the same part of the city with the line of the canal from Twenty-seventh street to Seventeenth street located upon it, the squares are numbered. As shown by this plan the canal is located on B street, directly on the north line of Square 148; that it includes a small part (the upper portion) of Square 129 and then extends through the public reservation No. 6, striking Square 89 some distance below the line of Water street, and thence extending through the central portion of squares 89 and 63, thence through the public ground at the Observatory and crossing Twenty-fifth street takes in a portion of Upper Water street and of an unnumbered square on the south of it, and then extends through the central part of square south of Square 12. In 1803, as shown by the King Map, but small portions of Squares 148 and 129 were above tidewater, the remaining portions of the squares being laid out in the river; that the whole of reservation No. 6 was laid out in the river, and that the whole of Square 89 with the exception of a small piece at the northeastern corner was laid out in the river; that the upper portion of Square 63 was beyond the line of the tide and that the lower portion of the square was laid out in the river; that the unnumbered square south of Square 22, and on the south line of Upper Water street, was wholly in the river, and that a considerable portion of square south of Square 12 was laid out in the river.

The plat of Square 148 (Record, Vol. 3, page 686), which was used in the division between the Commissioners and Marcia Burnes, heir of David, one of the original proprietors, does not show A street south, which street was its southern boundary, according to the plan of the city; the same may be said of the plat of Square number 129 (Ib. 787), which was divided December 26, 1796; the same may be said of the plat of Square numbered 89 (Ib. 700), which was divided August 28, 1799; and the same may be said of the plat of Square numbered 63 (Ib. 793), which was divided June 26, 1794. But upon the Dermott Map of 1797 the Water street is laid out as the southern boundary of said Squares 89 and 63, showing that after the partial survey of the squares used in the division with the original proprietors the street indicating the southern boundary of Squares 63, 89, 129 and 148 on the plan of the city was surveyed and laid out at those points.

The plat used in the division of Square 22 (Ib. p. 830), surveyed July 16, 1793, shows a Water street as its southern boundary; and the plat used in the division of square south of Square 12 (Ib. 821), surveyed March 31, 1799, shows a Water street for its southern boundary.

The section of the plan of the city given in evidence by the defendant Canal Company shows the street intervening between them and the river south of the whole line of the canal from Seventeenth to Twenty-seventh street. This street being the property of the United States whatever riparian rights attached to it belonged to the United States.

> The Potomac Steamboat Co. *vs.* Upper Potomac Steamboat Co., 109 U. S. 672.

It is submitted to the court that it is immaterial that the towpath of the canal, an embankment, was constructed in the waters of the river between said streets under powers conferred by its charter or by permission of the public authorities. The Company constructed its canal at this

point with notice of the fact and understanding that the plan of the city provided ultimately for a street between it and the river; the street being a street in law, it is competent for the United States to reclaim the land from the water and make it a street in fact, whenever the public necessities require it.

In speaking of this identical matter this court has said:

> "And it is immaterial that the ground laid out as a street was not in a condition to be used as a street, or that much labor was required to place it in that situation, or that, in fact, it had not been used as such for a long period of time."
>
> Potomac Steamboat Co. *vs.* Upper Potomac Steamboat Co., 109 U. S. 672, 684.

According to the provisions of its charter the Chesapeake and Ohio Canal Company is given an estate *in perpetuity* only in such lands as may be required for its purposes *through purchase* from the owners or *by condemnation;* and the only squares in which it is shown by the testimony that the Company acquired land, by purchase or condemnation, upon which to construct its canal, are the three squares known, respectively, as Square south of Square 12, Square 63, and Square 89. The other land used by it for its canal was the property of the United States, which made no specific grant for the same.

The language of the Act of Congress of March 3, 1825, ratifies and confirms the Company's act of incorporation only to such extent as may be necessary—

> "to carry into effect the provisions thereof in the District of Columbia, within the exclusive jurisdiction of the United States, AND NO FURTHER."

In so far as the property of the United States was concerned, a mere right of way through the same for the canal gratified the requirements of this act. In the language of the court below (Record, Vol. 7, p. 2535):

> "The corporation is the creature of its charter, which limits its powers and prescribes its duties. It was in no degree relevant to the objects of its creation that it should acquire riparian rights along the Potomac. The possession of such rights was scarcely more germane to its corporate functions than the cultivation of a farm or running a cotton factory. Again, this section of the canal has been destroyed and almost obliterated, and has not been operated or used in any manner since about 1860. (Letter of President Clark, Vol. 6, p. 130.)
>
> "It could not be tolerated that such important rights, acquired only as an incident to its possession of the bed of the canal for purposes of inland transportation, can be recognized as belonging still to the company in such wise that notwithstanding its neglect of the proper business for which alone it was created, it may claim riparian rights in connection with its idle and abandoned canal bank, and in this way obstruct the navigation of a great river or delay its improvement indefinitely. (109 U. S. 686.)"

It is inconceivable that Congress intended by legislation couched in such guarded terms to bestow upon the Company the fee-simple title of the United States not only to the streets which the Company might occupy with its canal, but also to the streets and other land of the United States intervening, according to the plan of the city, between the canal and the river. Nevertheless, it was claimed on behalf of the Canal Company, in the argument below, that, notwithstanding the plan of the city, wherever the towpath of the canal was contructed in the water and over land, the beneficial ownership of which at the time it was taken by the company was in the United States, the towpath became the *ripa*, and that the Company thus acquired riparian rights by virtue of said acts of Congress, and that the sale and conveyance on March 2, 1848, of Lot 2, in Square 129, by the Commissioner of Public Buildings to Samuel De Vaughn, and title to which is now vested in the appellant Richard J. Beall, was an infringement upon the Company's riparian rights.

The Company was confronted with the "plan of the city" at every step in its proceedings in the extension of its canal through the city to the mouth of Tiber or Goose Creek, at the foot of Seventeenth street. The mention of the word "square" necessarily suggested the plan. Effective notice was brought home to it at the very outset through the plat Exhibit C. & O. C. C. No. 1, showing its proposed route.

It applied to and obtained from John Cox, justice of the peace, a warrant to the Marshal of the District of Columbia for a jury of inquisition as to the damages to be sustained by Jane Beverly and others, the owners—

> "of all that part of lot 3, in square south of 12, bounded as follows, to wit: beginning at the end of 33 feet, measured due west on the north line of said lot, as laid down on the *ground plan of said city*, from the northeast corner of said lot, and running thence due east on said north line 33 feet to said northeast corner; thence on the east line of said lot, due south 36 feet, and thence in a straight line to the beginning;"

and of—

> "all that part of the lot of ground numbered 5 in said square, bounded as follows, to-wit: beginning at the end of 38 feet, measured due east on the south line of said last lot, from the southwest corner of said lot, and running thence on said line of said lot due west 38 feet to the said southwest corner, thence on the west line of said lot due north 57 feet, and thence in a straight line to the beginning."
>
> Record, Vol. 3, pp. 970–1.

The warrant and inquisition describes another parcel of ground in this square, the property of William Easby, as "part of lot 4 in square south of 12 on the *ground plan of said city*, beginning," etc.

Record, Vol. 3, pp. 971–2.

The plat Exhibit G. P. No. 11 shows that a part of Lot 6 in this square is also included in the canal, as to which

there is no evidence of the manner in which the Company acquired title; and although a part of each of the eleven lots in Square 63 was taken for the company's canal, the record discloses no evidence of title by deed or condemnation to any of said lots other than Lots 3, 4 and 5.

William Waters conveyed to the company—

> "all that part of the lot of ground . . . on the authentic plats of said city designated lot 4 in square 63, beginning at the end of 116 feet, measured south, on the west line of said lot from the northwestern corner thereof, and running thence on said west line south 135 feet thence south 68° east 17⅔ feet to the east line of said lot at the distance of 254 feet, measured south, on the said east line from the northeast corner of said lot; thence on the said east line north 135 feet; and thence in a straight line to the beginning."
>
> Record, Vol. 3, pp. 972–3.

William B. Randolph conveyed to the company "all that part of the lot . . . on the authentic plats of said city designated lot 5 in square 63," beginning at a point on the east line of said lot, 116 feet south from its northeast corner, thence south 105 feet, then north 68° west 34½ feet to the west line of the lot at the distance of 216 feet from its northwest corner, then north 105 feet, and thence to the beginning.

Record, Vol. 3, p. 973.

Sarah Blackstone and others conveyed to the company part of Lot 2 in Square 63, being the part of said lot "now in their occupancy," no description being given by metes and bounds.

Record, Vol. 4, pp. 973–4.

There are fourteen lots in Square 89, and although a part of each of them is included in the company's canal, evidence of title is only deduced to seven of them.

The Bank of the United States conveyed to the company "all that part or parts of lots 8, 9, 10, 11, 12 and 13, square 89," beginning at a point in the east line of lot 8 108 feet south from its northeast corner, thence south 107 feet, thence south 85° west 174 feet, thence north 68° west 152 feet to the east line of lot 14, then north 103 feet, then south 68° east 161 feet, then north 85° east 60 feet to the west line of lot 9, then north 12 feet, and then to the beginning.

Record, Vol. 3, p. 977.

One of the instruments in the chain of title previous to this deed is a conveyance from William Ragan, devisee of Joshua Ragan, to whom Lot 13 had been assigned by the Commissioners in the division of the square in lieu of lot 18 in Hamburg, of which said Joshua Ragan was the owner. The conveyance which is dated June 23, 1797, is to Joseph Keeper of Lot 13 in Square 89—

> "being 16½ feet front on Water street, and extending southward to the channel of the Potomac River *subject to be intersected by such street as the Commissioners in their regulations and the general plan of the city may require.*"
>
> Record, Vol. 3, p. 976.

Fleet Smith conveyed to the trustees of the canal company "all that lot known *in the plan of said city* as lot 14 in square 89."

Record, Vol. 3, p. 978.

The bearing of the plan of the city upon the claims of the Chesapeake and Ohio Canal Company can not be more justly and effectively summarized than is done in the opinion of the court below (Record, Vol. 7, pp. 2532–3):

> "It is established by all the plats of the city from the earliest dates, that every part of the canal from its entrance near Twenty-seventh street to the termi-

nus on Seventeenth street was constructed north of the street designed by the founders to run between the squares nearest to the river front and the river itself, known as Water street.

"On the Ellicott or Engraved Map, made in 1792, a vacant space is shown all along the river front, evidently designed to indicate the place this street was to occupy, between the nearest squares and the waters of the river. On that map the street is shown as lying south of all the squares and reservations from Square 12 to Square 148, and is marked as 'A Street,' under which designation it is delineated on the King Map of 1803, as a continuation of what is called 'Water Street' at one place and 'Lower Water Street' at another; the three designations describing the same continuous street.

"Without going into a particular examination of the voluminous testimony on the point, we may allude to the directions in June, 1794, by the Commissioners to the surveyor, to make surveys and returns of Water street 'according to the design of the plan of the city,' in a locality where the vacant space referred to on the margin of the river is altogether unmarked on the plan; and to the report of the surveyor in July following, that 'Water street on the Potomac is adjusted and bounded' (Testimony, Vol. 4, p. 1595); and to the letter of the Commissioners of February 27, 1797, to President Washington, in which, speaking of the 'Engraved plan' they say, 'that plan required the doing of many acts to carry it into effect, such as the laying out and bounding a Water street on the waters which surround the city.' Mr. Jefferson states the same idea thus in his letter to Thomas Munroe, the Superintendent, of July, 1804 (Vol. 7, p. 2273), 'The plan and declaration of 1797 were final, as far as they went; but even they left many parts unfinished, some of which still remain to be declared.'

"This is in accord with the language before quoted from the opinion in 4 Peters, Van Ness *vs.* Washington, p. 282, that a prohibition which would close all legislative power to make additions or changes not inconsistent with the plan itself, should not be lightly presumed or readily admitted.

"In the same way they claimed and exercised the right to lay out additional squares on any open space not appropriated to public purposes. (Vol. 7, p. 2247.) The return of Nicholas King, the surveyor, 'of the plan of a water street and his observations thereon,' was made March 9, 1797. (Vol. 4, p. 1603.) These plans, called the 'Brown Plats,' show Water street from the confluence of Rock Creek with the Potomac to Square 12, and thence running south of Squares 63, 89, etc., as shown on the King Map of 1803. That sales of lots were made with reference to its existence is proved. On the map bearing his name and the date of 1803, there appears south of Square 22, between Twenty-sixth and Twenty-fifth streets, a street marked 'Upper Water Street,' south of which is an unmarked square bounded on the river side by a street marked 'Water Street,' which runs southeastwardly of equal width, until it arrives at Twenty-second street, where it is given the name of 'Lower Water Street;' and at Twenty-first street it is called by the name of 'A' street on the Engraved Map, which name it bears until it reaches the west side of Seventeenth street extended.

"On the Dermott Map, which was ordered in June, 1795 (Vol. 4, p. 1519), a similar vacant space next to the river appears south of these squares as far as the Appropriation No. 6, and it is laid down by name on that map, on part of the Eastern Branch water front. It is indicated also on the earliest plan of all, prepared in 1791 by L'Enfant, which, though not adopted, is evidence of what appears to have been the general understanding on the subject.

"All these maps were in existence when the canal company was incorporated and when it applied for the privilege of cutting this section of its improvement (then called the Junction Canal) through the city."

James C. Clarke, the president of the company in 1871, in a communication to the stockholders, calls their attention "to the portion of the canal within the City of Washington," and requests instructions from them "as to the disposition

to be made of it." He transmitted therewith a "report of a committee of the directors." He states that:

> "But few boats have passed through it within the last fifteen years, and probably none since 1860.
>
> "It has been completely neglected, while deposits have accumulated to within one and two feet of the surface and some portions of it are entirely filled. The Board of Health of the District complains of it and requires that it be entirely filled up, or else excavated to a certain depth throughout."

He further states that:

> "It is not probable that, if open to navigation, a revenue would be derived equal to the cost of maintaining it;"

but that counsel advises that it cannot be abandoned without the assent of the city; and that, "if it is abandoned, the lands will revert to the original owners;" that the towing path had been leased for a long series of years, and that the company could not—

> "abandon the canal and vacate its own title to the lands without becoming liable for damages to their lesee unless his consent should first be procured."

In conclusion, he says:

> "Preliminary to an abandonment it will be necessary to obtain the consent of the State of Maryland, of the city of Washington, and of the lessee of a portion of the lands. *To a virtual abandonment no active measures are necessary.* If no steps are taken to open it within a short period, the Board of Public Works of the District will probably fill it up."
>
> Record, Vol. 6, pp. 130–1.

The committee of the directors recommended that the Washington branch of the canal be placed and maintained in navigable condition; but the policy of a "virtual abandonment," suggested by the president of the company, prevailed.

In paragraph 16 of the Company's answer it is stated that the defendant—

> "did construct a gate-house at the foot of 17th street, and a pier, embankment, or mole at the foot of said 17th street and extending into the Potomac River . . . and that said gate-house and the made land appurtenant thereto, and part or all of the said pier, embankment, or mole at the foot of said 17th street, as the same now exists, are the property of this defendant."

The basin at the mouth of Tiber Creek "to receive the eastern termination of the Chesapeake and Ohio Canal" was constructed by the corporation of the city of Washington and the company's "pier, embankment or mole," did not extend into the Potomac River as claimed, but into this basin (Rec., Vol. 7, p. 2321); and the gate-house referred to was erected under permission of the city government to occupy the necesssary space not exceeding sixty by thirty feet. (Acts of Councils. Ib. p. 2335.)

But, even if the conditions had not been affected by the existence of the city, and the Canal Company had located and constructed its canal wholly on the shore of the river, or in its bed, between Easby's Point and Seventeenth street, it would not in that case be entitled to the riparian rights claimed.

Upon this question what was said by this court in Illinois Central RR. Co. *vs.* Illinois, 146 U. S. 444, is conclusive:

> "The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated—the construction and operation of a railroad thereon with one or more tracks and works in con-

> nection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials and privileges belonging to the State were granted solely for that purpose. . . . Nor did the railroad company acquire by the mere construction of its road and other works any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordinance, which was simply for the construction of a railroad on a tract not to exceed a specified width, and of works connected therewith."

Furthermore, the titles to the beds and shores of navigable waters, and all rights appurtenant or incident thereto, are held and enjoyed subject to the paramount right of the United States to occupy such waters for purposes of navigation, etc.

In Gibson *vs.* United States, 166 U. S., p. 269, the plaintiff sued in the Court of Claims to recover damages for injuries suffered by her from the construction of a dike in the Ohio River by the United States, in the prosecution of a general plan for the improvement of navigation of the said river. That court denied the claim and dismissed the petition. On appeal to this court, that judgment was affirmed. The Chief Justice, speaking for the court, said:

> "All navigable waters are under the control of the United States, for the purpose of regulating and improving navigation; and, although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. *South Carolina* vs. *Georgia, 93 U. S. 4; Shively* vs. *Bowlby, 152 U. S. 1; Eldridge* vs. *Trezevant, 160 U. S. 452.*
>
> . . . . . .

"Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation, in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction; but this was an assertion of right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property not burdened with such servitude to public property."

See, too, the opinion of Morris, J., in the Hawkins Point Light-house Case, 39 Fed. Rep. 77. This case was brought to this court on writ of error and was remanded to the Circuit Court of the United States with instruction to remand the same to the State court.

Scranton *vs.* Wheeler, 16 U. S. Appeals, 192.
Sage *vs.* City of New York, 154 N. Y. 61.

The claim of the Chesapeake and Ohio Canal Company to riparian rights along this abandoned part of its former route is, therefore, without foundation, and the portion of the decree below which so declares should be affirmed.

CLASS 4.

The Claims to Riparian Rights, Rights of Access to the Channel of the River, and to Accretions, Natural and Artificial, Made by the Owners of Lots in Squares Along the River West of Seventeenth Street West, Namely, Squares 148, 129, 89, 63, 22, and Square South of Square 12.

Of the defendants whose claims fell within this class but two have appealed to this court, namely, Richard J. Beall and the Trustees of the Estate of William Easby, deceased.

In his answer (Rec., Vol. 1, p. 108), the defendant Beall avers that he is the owner in fee-simple of Lot 2 in Square 129, and "also of the riparian and wharfage rights on the Potomac River fronting said square as appurtenant thereto."

In his deposition (Rec., Vol. 3, p. 67–8), taken in his own behalf, the defendant Beall amplifies very considerably the claim made in his answer; he testified:

> "I bought the lot believing I owned to the river, as the deed stated, and at the same time I believed that I went with the lot to the other side of the Potomac River, from information that I got from my great uncle and the general conversations of different persons, under the charter of Lord Baltimore."

The Trustees of the Estate of William Easby, deceased, in their answer (Rec., Vol. 1, p. 98), aver that the said William Easby was the owner of Lots 2, 3, 4, 5, 6, 7, 8 and 9 in Square 63; of Lots 3, 4, 5, 6 and 7 in Square 89; and of Lot 1 in Square 129; and—

> "That the southern boundary of the said lots is, as your defendants are advised, the Potomac River; therefore, your defendants claim that the said lots are entitled to water privileges, and extend to the channel of the Potomac River."

The answer further avers that said Easby was the owner of Lot 2, in sc ıre south of 12—

> "and ' le not included in the boundaries marked in 'Ex oit B,' yet, as your defendants are advised, it has water privileges and extends to the Potomac River, and is, therefore, part of the property described in the said bill."

What has been said in reference to the claim of riparian rights made by the Chesapeake and Ohio Canal Company by virtue of its ownership of parts of lots in Squares 63, 89 and others, is referred to as equally applicable to the claims made by said Beall and said trustees of Easby.

Squares 63, 89 and 129 are shown on the Engraved Plan of Ellicott as having a southern boundary on a street which intervened between them and the river.

The return of the surveyor of the survey of Square 63 (Record, Vol, 3, p. 793), that of Square 89 (Record, Vol. 3, p. 700), and the plat of Square 129 (Rec., Vol. 3, p. 787) show that the actual surveys of them extended no farther than the river, and that the lots were given on the plats prepared of them for the purpose of division under the deeds of trust an indefinite extension into the waters of the river.

The deeds of trust provided for a division of the squares of the city according to a plan to be adopted and formulated by the President; that plan, as we have seen, being the one according to which the sales of lots generally were had, exhibited a street as the southern boundary of said Squares 63, 89, and 129, and it must obviously prevail and be gratified as against the returns referred to, if there be conflict between them. The plan created a street in law which the public authorities had the right to make a street in fact whenever the public necessities required it in the actual laying down of that plan upon the ground.

That this was shown to be the common understanding is demonstrated by the fact that upon the Dermott map of 1797 the street is laid out as a southern boundary for said Squares

63 and 89, and that upon the King plats (Brown sheets) of 1797, and the King plan of 1803, the street is laid out and extended as a southern boundary for all of the squares from Seventeenth street to Easby's Point.

That the early owners of lots understood that the streets of the city were to be ultimately laid out in that locality is indicated by the conveyance from William Ragan to Joseph Keeper, dated June 23, 1797, (Record, Vol. 3, p. 730) for one of said lots which describes the property as—

> "all that piece or parcel of ground in the city of Washington, being lot numbered thirteen (13) in square eighty-nine (89), being sixteen and a half feet front on Water street and extending southward to the channel of the Potomac River, *subject to be intersected* by such street as the Commissioners in their regulations, *and the general plan of the city, may require.*"

And, as we have seen, the wharfing regulations promulgated by the Commissioners July 20, 1795, (Record, Vol. 6, p. 180) provided for an extension of wharves out into the Potomac and Eastern Branch for such distance as would not injure or interrupt—

> "the channels or navigation of the said waters; leaving a space wherever the general plan of the city requires it of equal breadth with those streets."

Manifestly the squares which were wholly laid out in the water, and the portions of others which fell in the water, were not such as the United States were under any obligation by the terms of the trust to divide with the proprietors; such squares and portions of squares belonged wholly to the United States and, although included in the city, were held by title different from the upland conveyed by the deeds of trust.

If, however, the United States are estopped by the fact that squares wholly or partially laid out in tidewater were divided with the proprietors of the upland, then the most

that can be claimed by the defendants who have established a good title, either by matter of record or by matter *in pais*, to lots in said Squares 63, 89, 129 and others thus situated, is compensation for so much of their lots as lie north of the street shown on the plan to be the southern boundary of said squares, and which parts of lots were taken by the United States in the reclamation of the flats.

The value of such lots and parts of lots has been determined by the court below and an appropriation made by Congress for the payment of such values. The defendants Beall and the trustees of the estate of William Easby, deceased, are the only defendants who have declined to receive the compensation found to be due.

The claim to riparian rights made by said defendants (appellants) being without foundation, the decree against them should be affirmed.

CLASS 5.

The Claim made by Certain of the Descendants of Robert Peter, an Original Proprietor of Lands in the City of Washington, to Certain Ground Included in the Reclamation and Situated Near the Public Reservation Known as the Observatory Grounds.

The answer of these defendants (Record, Vol. 1, p. 88), after setting forth the ownership by their ancestor, Robert Peter, of the tract called "Mexico," and the conveyance by him to Beall and Gantt in trust, states—

> (4) "That a considerable parcel of land lying south of the terminus of Twenty-sixth street, also south of the street running south of square twenty-two, as laid down on complainants' plat; also south of the terminus of Twenty-fifth street; also south of the Naval Observatory Grounds, to about the centre thereof, has never been laid off into lots or streets by the properly authorized authorities, or by any person, but remains in the same condition as when originally granted by the said Robert Peter, and subject to the same trusts as contained in said deed hereinbefore referred to, the only changes in the frontage of said lands prior to the proposed improvements was from natural alluvium and accretions, and which were appurtenant to the said land."
>
> (5) "That up to the present time the said land so as above mentioned fronting on the north side of said Potomac River, with its natural accretions, remains undisposed of, together with all appurtenances and riparian rights to the same belonging."
>
> (6) "That as early as the 25th day of June, 1798, the said Robert Peter set up his claims to the riparian rights attached to the aforesaid lands, and among other things contained in a letter of that date, written by G. Scott and A. White (then Commissioners of the District of Columbia), addressed to Mr. Nicholas King, attorney of Robert Peter, is the fol-

lowing clause, *i. e.*, 'with respect to square No. 22 we do not conceive that it is entitled to any water privilege, as a street intervenes between it and the water; but, as there is some high ground between the Water street and the water, we have no objection to laying out a new square between Water street and the channel and divide such square when laid out so as to make it as beneficial to Mr. Peter and the public as circumstances will admit.'"

(7) "That at no time has there been any lands between the lands, so as aforesaid conveyed by the said Robert Peter to Thomas Beall and John M. Gantt, as trustees, and the channel of the river other than such as has been produced by alluvium and accretion, and there could be no patent issued by the United States to any person for such alluvium and accretion and any such supposed patent issued, or attempted to be issued, was void and of none effect."

. . . . . .

(17) "That these defendants, for themselves and the other heirs and devisees of Robert Peter, the original grantor to Thomas Beall and John M. Gantt, trustees in the deed hereinbefore referred to, claim all the rights as secured to the said Robert Peter under said deed of trust, beginning at the southeast corner of Square 12, as designated on complainant's Exhibit 'B,' and running up and north with the east side of said square 12 to a point opposite of the south line of the street marked 'Water street,' on said exhibit; then across said Twenty-sixth street to the south side of said 'Water street'; then following the south line of said Water street until the same reaches Twenty-fifth street; then on the same line across Twenty-fifth street to the east side thereof; then up and with the east side of said Twenty-fifth street, on the east side thereof, to the southwest corner of the Naval Observatory Grounds; then with the south line of the Naval Observatory Grounds to a point which would be intersected by the west

> line of Twenty-fourth street, if extended through said grounds; then by a line from that point with the line on the east side of said Twenty-fourth street, if extended to the channel of the Potomac River; then up and with said channel to a point opposite the place of beginning and which would be intersected by the line of the west side of Twenty-sixth street if extended to said channel, and then reversed with said line, if so extended, to the place of beginning, together with all the alluviums, accretions, riparian rights, and appurtenances attached to the same as extended to said channel of said Potomac River."

This description is not very definite; but, in any possible construction of its meaning, it is evident that Robert Peter at the time of the execution of his deed to Beall and Grant, trustees, had title to but a small portion of the land now claimed, and no title whatever to the residue.

It is first to be observed that the patent for the tract called "Mexico" (Record, Vol. 5, page 121), which is the source of title set up by these defendants, is apparently a resurvey upon certain older grants with contiguous *vacancies* (that is, of land belonging to the United States under the act of Cession) added, amounting to 2 acres and 31 square perches, and that it was granted by the State of Maryland on October 28, 1796; in the division of the squares laid down on these vacancies, Mr. Peter, of course, was allowed an area in lots amounting to 1 acre and 15½ perches to which he was not entitled. The older grants mentioned in the patent for "Mexico," are not in evidence; and of the location of their lines, with respect to the property now claimed, the record discloses nothing; and whether they had the river for a boundary does not appear, although it is proper to state that the fair inference from the testimony would be that they did have such boundary.

The tract ("Mexico") has for a beginning the "Key of all Keys" which the plats show to be located in the public appropriation No. 4, called the Observatory Grounds, and

by various courses and distances it reaches "Cedar Point" (now known as "Easby's Point") from which its last or home-line is given as "straight to the first beginning."

Peter obtained no title by this patent to any land to which he did not have title before; the State had none to grant; by its Act of Cession of 1791 it had, prior to the date of the patent, transferred all its interest in lands in the ceded territory to the United States; the provision of that act continuing in force "the jurisdiction of the laws of this State over the persons and property of individuals" in the cession had relation only to *private* property, and did not apply to property *held by the State* and so transferred.

Shoemaker *vs.* United States, 147 U. S. 313–14.

(See the discussion of this point on pages 107 to 117 of this brief).

Prior to the date of this patent, and in June, 1791, Mr. Peter had executed and delivered a conveyance (Record, Vol. 5, p. 37) of his lands to Beall and Gantt in trust that the Federal city should be laid out upon them and other lands similarly conveyed.

By this deed of Mr. Peter there passed to the trustees every scintilla of right which Mr. Peter had to the mainland, and all his rights as riparian owner under the compact, of 1785, between Maryland and Virginia.

The deeds of Mr. Peter and others, which were all in the same form, gave the President complete and absolute power over the plan according to which the city should be laid out. The city was to have "such streets, squares, parcels and lots" as he should "approve," and—

> "all of said streets and such of the said squares, parcels and lots as the President shall deem proper for the use of the United States,"

were to be "for the use of the United States forever," which last-mentioned squares, parcels and lots were to be paid for, and "as to the residue of the lots" (that is, building lots)

into which the lands conveyed should be divided, "a fair and equal division" should be made between the public and the grantors. The only possible title which Mr. Peter or the other proprietors could under this instrument regain to any portion of the land conveyed was that provided for by said deed, and this right extended only to a reconveyance of such part of the land as was "not laid out in the said city," and to a conveyance of such "lots" as might fall to him upon such division. Whether any of such lots would be entitled to riparian rights depended on their being so situated under the plan adopted that as matter of law such rights attached to them.

There was no part of the land conveyed by these deeds which was "not laid out in the said city;" there is no act or declaration of the President, or of any one in authority under him, showing, or tending to show, that any portion of the lands conveyed by Mr. Peter and the other proprietors to Beall and Gantt, trustees, was ever excluded from the city, and no ground whatever for any such assumption. The Engraved Plan of Ellicott, which was adopted by the President, and all the subsequent plans which have been heretofore referred to, show that not only were all the lands so conveyed included within the city, but that lands under the river itself were also included in it, and streets and squares and parts of squares laid out upon them.

The Commissioners, in a letter to Mr. Dennis, "Chairman of a Committee of Congress," dated March 23, 1802 (Vol. 4, pp. 1607–1608), state that the Ellicott Plan was engraved in October, 1792, and that:

> "*It has been since pursued in all the operations in the city, under the direction of the Commissioners* as far as it was practicable. . . . The actual survey had another apparent effect; it occasioned many squares to be laid in the water, being governed by the channel, and to insert other squares between the apparent water squares and the river; *but this was of necessity or in conformity with the Engraved Plan.*"

As to squares laid out wholly in the water, Mr. Peter was not entitled to a division, nor in strictness was he entitled to an equal division of the land under water in the case of a square laid out partially upon the upland and partially in the water, because the land under water was wholly the property of the United States; yet, the early city records show that squares situated as last mentioned were divided with Mr. Peter.

The Commissioners' letter to Nicholas King, as attorney for Mr. Peter, dated June 25, 1798 (Exhibit G. P. No. 1, Rec., Vol. 7, p. 2250–1), is relied on by these defendants; it reads as follows:

> "When the Commissioners have proceeded to divide a square with a city proprietor, whether water or other property, they have executed all the powers vested in them to act on the subject. It appertains to the several courts of the State and of the United States to determine upon the rights which such division may give; any decision by us on the subject would be extra-judicial and nugatory; of this, no doubt, Mr. Peter, if applied to, would have informed you.
>
> "With respect to square No. 22, we do not conceive that it is entitled to any water privilege, as a street intervenes between it and the water; but, as there is some high ground between the Water street and the water, we have no objection to laying out a new square between Water street and the channel, and divide such square, when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

In the Steamboat Company Case, reported in 109 U. S. 672 this court sustained the view of the Commissioners that the intervention of the street between it and the river deprived it of riparian rights. This decision clearly disposes of any claim of right in Mr. Peter, or his heirs, to any portion of the land under the river beyond the line of such street; and, hence, disposes of the claim here made to the unnum-

bered square lying wholly in the bed of the river outlined upon the King plan and situated south of the street which is the southern boundary of Square No. 22.

The suggestion made in the Commissioners' letter to Mr. King was carried into effect by the laying out of the square south of Square No. 12, as it now exists, the return of the survey of which is dated March 31, 1799, and which square was divided with Mr. Peter May 19, 1800. This is evident upon an inspection of the King plan, which shows the water line as being close to the southerly line of Square 22, with nothing answering the description of "high ground" between Square 22 and the river; while to the west of Square 22 the plan does show high ground, which was included in square south of Square 12. It is also shown on the section of a plan of this part of the city prepared by Nicholas King (Exhibit G. P. No. 7, Record, Vol. 5, between pp. 124 and 125) and found by Mr. Forsyth, the District Surveyor, among the records of his office (deposition of Forsyth, Record, Vol. 3, p. 926); and it is also shown upon the map of the tract called "Mexico," with certain lots and squares laid down upon it, given in evidence as Exhibit G. P. No. 2 (Record, Vol. 5, between pp. 124 and 125) upon the cross-examination of the defendant, George Peter. The map last referred to is taken from a book prepared by Nicholas King for Robert Peter, in the possession of the defendant William L. Dunlop. (Deposition of George Peter, Record, Vol. 3, p. 922.)

The attention of the witness (Forsyth) having been directed to the difference in outline between square south of Square 12, as shown on Exhibit G. P. No. 7, and as shown on the plat of said square in the book called Register of Squares (Record, Vol. 3, p. 821), he says: "It does not conform to the plat on record in my office." He was then asked:

> "X-Q. Would not that indicate that the square south of square 12, as shown upon this plat (Exhibit

> G. P. No. 7), was changed in its dimensions by the agreement of the parties so as to conform to the shape and situation shown upon the plat in this book belonging to the estate of Robert Peter, and which latter plat gives the same outlines for the square as shown in the books of your office, and corresponds with the lines of the square as they now exist?"

and he answered:

> "Very evidently it does."

Mr. King, in fact, in his letter to the Commissioners of June 22, 1798 (Record, Vol. 7, p. 2249–50), to which their letter of June 25, 1798, is a reply, states that if a square is laid out south of Square 22, it "will be covered to a small depth with water," for which reason he suggests a redivision of Square 22, and to "attach the *low ground* to it."

There were two returns of survey for this square; one dated July 30, 1797, and the other dated March 31, 1799 (Record, Vol. 3, p. 822).

The return of the survey of the Square No. 22 is dated July 16, 1793, and it was divided with Mr. Peter July 27, 1796 (Record, Vol. 3, p. 830–1).

It appears from this very clearly that at the date of the Commissioners' letter, June 25, 1798, Square No. 22 had been surveyed and divided, and that a survey had been returned for a square south of No. 12, of which no division had taken place, and that subsequent to the date of the letter and on March 31, 1799, a new survey had been returned changing its dimensions and taking in and including in it "the high ground" referred to in the Commissioners' letter. The testimony of Mr. Forsyth (Record, Vol. 3, p. 925–30), who was examined as a witness on behalf of these defendants, supports this view of the matter.

No claim of interest by Mr. Peter in any ground south of Square 22 was ever recognized by the Commissioners, and the records show a final adjustment of his accounts with the

Commissioners on May 19, 1800; Mr. Peter's lands in this section of the city fell within the tract called "Mexico." The note to square south of 12 (Rec., Vol. 3, p. 822; Map, Exhibit G. P., No. 3, Vol. 5, bet. pp. 120–1) shows that two of the Government's lots in this square were to go to him in the settlement; and the note signed "N. King, Atty. for R. Peter," to Square 22, dated in 1800, states that—

> "The Commissioners conveyed to Robert Peter the Lot No. 6 in this Square, in consideration of a balance due him, by the public, of square feet in the division of lots."

Since 1800, and down to the time of the institution of this suit, the final character of this settlement has not been impeached.

The claims of these defendants are not only not sustained by the testimony but are clearly disproved by it, and it follows that the decree below as to them should be affirmed.

CLASS 6.

The Claims to Riparian Privileges Wharves and Wharfing Rights Made by Owners of Lots in the Squares Facing the River beginning with Square 233 and Extending to the Line of the Arsenal Grounds.

The proceedings of the public authorities under the act of July 16, 1790, in locating the ten miles square, for the permanent seat of the Government of the United States under the constitutional provision, and in founding a city for the Federal Capital, according to a plan approved by the President, have been set forth on pages 120 *et seq.* of this brief. What is there said is applicable in considering the merits of the claims advanced by the appellants, who fall within this class, and the attention of the court is respectfully called to it in this connection.

Some account of the proceedings in the Congress of the Confederation, and in the Congress under the Constitution, may be properly added to it, as tending to further illustrate the course of events which led finally to the establishment of that permanent seat upon the farms of the Potomac.

The first Congress of the Revolution met in Philadelphia, on September 5, 1774; on December 12, 1776, they adjourned to Baltimore, where they met on the 20th and continued until February 27, 1777, when they adjourned to meet in Philadelphia, on March 12; on September 14, 1777, it was resolved that the Congress meet in Lancaster, if obliged to remove from Philadelphia; they met at Lancaster on September 27, and on the same day adjourned to York; and Philadelphia having been evacuated, they resolved on June 27, 1778, to meet at the latter place; the Articles of Confederation were adopted July 9, 1778.

On June 4, 1783, they assigned the first Monday of October following for taking into consideration an act of the Legislature of Maryland relative to the cession of the city of Annapo-

lis to Congress for their *permanent* residence, and also an act of the Legislature of New York relative to the cession of Kingston for the same purpose; in June, 1783, it was resolved by the Congress—

> "that the President and Supreme Executive Council of Pennsylvania be informed that the authority of the United States having been this day grossly insulted by the disorderly and menacing appearance of a body of armed soldiers about the place in which Congress were assembled, and the peace of this city being endangered by the mutinous disposition of the said troops now in the barracks, it is in the opinion of Congress, necessary that effectual measures be immediately taken for supporting the public authority."

It was further resolved that in case it should appear:

> "that there is not a satisfactory ground for expecting adequate and prompt exertions of this State for supporting the dignity of the Federal Government, the President . . . be authorized and directed to summon the members of Congress to meet on Thursday next at Trenton or Princeton, in New Jersey, in order that further and more effectual measures may be taken for suppressing the present revolt and maintaining the dignity and authority of the United States."

On June 30, 1783, Congress met upon the summons of the President at Princeton. On July 1, 1783, it was resolved:

> "That Major General Howe be directed to march such part of the force under his command, as he shall judge necessary, to the State of Pennsylvania, in order that immediate measures may be taken to confine and bring to trial all such persons belonging to the army as have been principally active in the late mutiny; to disarm the remainder; and to examine fully into all the circumstances relating thereto."

On October 6, 1783, the order of the day was to take into consideration the propositions of the several States, from New York to Virginia, inclusive, respecting a place for the *permanent* residence of Congress, but no conclusion was reached. On the following day a motion was made—

> "That the buildings for the use of Congress be erected on the banks of the Delaware near Trenton, or of Potomac near Georgetown, provided a suitable district can be procured on one of the rivers as aforesaid, for a federal town, and that the right of soil and an exclusive or such other jurisdiction as Congress may direct shall be vested in the United States."

At frequent intervals subsequently the subject of the permanent seat of the Government engaged the attention of the Congress of the Confederation.

On March 4, 1789, the first Congress under the Constitution met at New York. On May 15, 1789, Mr. White, one of the Representatives from Virginia, presented a resolve of the Legislature of that State, offering a cession of ten miles square for the permanent seat of the Government; and on the following day Mr. Seney, a Representative from Maryland, presented to the House an act of that State, offering to the acceptance of Congress ten miles square of territory for the *permanent* seat of the Government. The subject of such permanent seat frequently engaged the attention of Congress thereafter, various places being taken into consideration; and, finally, the matter was determined by the Act of July 16, 1790. (1 Stats. p. 130).

This act, while providing for the appointment of Commissioners, whose duty it was made, under the direction of the President—to survey and lay out the Federal district, and to purchase or accept such quantity of land on the Eastern side of the river as the President should deem proper for the use of the United States, and to provide suitable buildings for the accommodation of Congress and the President and

the public offices of the Government—made no appropriation of money for these purposes; the third section simply provided:

> "That for defraying the expense of *such purchases and buildings*, the President of the United States be authorized and requested to accept *grants of money*."

Advances of money from the States of Maryland and Virginia furnished the primary fund used by the Commissioners in carrying this act into effect (Rec., Vol. 7, p. 2168). This fund was added to through the sale of lots conveyed in trust by the proprietors of lands in order that the Federal city might be laid out upon them.

Notley Young's Plantation at Turkey Buzzard Point Converted Into Lots in the Federal City.

Notley Young was one of such proprietors, and upon the deed executed by him depend for their validity the claims of the several defendants (appellants) comprised within this class.

By deed from Ann Young to said Notley Young dated December 5, 1761 (Record, Vol. 6, p. 397), there was conveyed to the grantee in fee—

> "part of a tract of land called Cerne Abbey Manor, Duddington Manor, New Troy, and Duddington Pasture, wherein the house of the said Ann now stands, Beginning at a bounded Hickory Bounded with Twelve notches standing near the fork of St. James' Creek, running thence north thirty-four Degrees West one hundred and seventy-two perches, then north fifty Degrees West one hundred and thirty-four perches then West one hundred and seventy-four perches to a cedar by the River side, then by & with the said River six hundred sixty and two perches to Turkey Buzzard Point, then east Thirty perches, north forty-seven Degrees, East sixteen perches by and with St. James Creek, North six Degrees & a half Degree East one hundred and sixty and four perches north

East Twelve perches, north Twenty-six Degrees East fifty perches, then to the Beginning Tree containing & laid out for four hundred acres of land more or less, . . . under the conditions following and not otherwise, That is to say That the said Notley Young, his heirs, Executors, Administrators, or assigns do or shall for and During the natural Life of the said Ann Young, Yearly and every year pay or cause to be paid unto the said Ann Young, & her assigns the sum of Fifty pounds sterling of Great Britain on the first day of February or within thirty days if demanded and also that the said Notley Young, his heirs & assigns shall permit and suffer the said Ann Young quietly and peaceably to possess Dwell in, use & Enjoy the Dwelling house for and During her natural life."

The deed provided that upon default in such payment and in the other conditions thereof, it should be void, and that the grantor should have the right to re-enter, etc.

The situation of said four hundred acres with reference to Duddington Pasture, and other tracts mentioned in the deed, is shown upon the plat returned by the surveyor with the resurvey called Cerne Abbey Manor (Record, Vol. 6, between pp. 366 and 367); the certificate of the resurvey will be found in Volume 6 of the Record, at page 385, the plat accompanying the same having been misplaced in the binding; similar plats will be found in same volume between pages 398 and 399, and in Volume 1 next to page 325.

The Turkey Buzzard Point mentioned in the deed became known later as Young's Point, then as Greenleaf's Point, and it is now known as Arsenal Point.

The title of Ann Young, the grantor, is traced back to grants from the Proprietary of Maryland by sundry instruments which will be found in the same volume at pages 367 to 397.

It is conceded by counsel for the United States (appellees) that at the time of the passage of the Maryland Acts of cession of December 23, 1788, and December 19, 1791 (Davis'

Laws, pp. 59, 64), Notley Young was seized of an estate in fee-simple in the land conveyed to him by said deed from Ann Young.

On October 30, 1790, and before the Federal district had been located, sundry proprietors of lands submitted a proposition to the President in which they state (Record, Vol. 7, p. 2159) that:

> "The object of the subscribers to the paper annexed is to accommodate,—they will cheerfully consent to any other arrangement, that may be thought reasonable, should their Lands, or any part of them, be selected for the Federal city;"

and after setting forth the advantages of Georgetown, and its vicinity, as a location for the city, they conclude as follows:—

> "We, the subscribers, do hereby agree and oblige ourselves, our heirs, executors and administrators, to sell and make over by sufficient deeds, in any manner which shall be directed by General Washington, or any person acting under him, and on such terms as he shall determine to be reasonable and just, any of the lands which we possess in the vicinity of George Town for the uses of the Federal city provided the same shall be erected in the said vicinity."

At this time certain land at and about the site of the old Naval Observatory grounds had been subdivided and laid out for a town called Hamburgh; and certain other land near the mouth of the Eastern Branch had also been laid out for a town under the name of Carrollsburgh.

On January 24, 1791 (Record, Vol. 7, p. 2165), the first proclamation of the President was issued, defining in part the territory to be accepted under the Act of 1790. It included the lands on this side of the river above the mouth of the Eastern Branch.

In an instrument dated February 21, 1791 (Record, Vol. 7, p. 2170), certain proprietors of lots in the town of Hamburgh state that—

> "it would be a desirable circumstance, to the subscribers, that the Federal City should be laid off so as to comprehend within its lines the town of Hamburgh"—

and that if a site which comprehended the town should be selected for the Federal City by the President a condemnation of all the lots in the town would be necessary unless the same could be had by purchase from the proprietors, and thereupon they (the subscribers) agree and bind themselves to sell their lots to the President—

> "for the uses of the Federal city and for such price for each lot as each of those lots shall be valued at, which may be condemned," etc.

On March 30, 1791 (Record, Vol. 7, p. 2173), the President issued his second proclamation, defining and completing the whole of the territory to be included in the District.

By an instrument dated March 31, 1791 (Record, Vol. 7, p. 2175), sundry proprietors of lots in Carrollsburgh agree with the President that the lots so held by them shall be—

> "subject to be laid out at the pleasure of the President as part of the Federal city, and that we will receive one-half the quantity of our respective lots as near their present situation as may agree with the new plan," etc.

Notley Young was one of the subscribers to this instrument.

By an instrument dated March 13, 1791 (Record, Vol. 7, p. 2183), Notley Young and others entered into an agreement with the President which, in part, is of the tenor following:

> "We, the subscribers, in consideration of the great benefits we expect to derive from having the Federal City laid off upon our lands, do hereby agree and bind ourselves, heirs, executors and administrators, to convey in trust to the President of the United States, or Commissioners, or such person or persons as he shall appoint, by good and sufficient

deeds in fee simple, the whole of our respective lands which he may think proper to include within the lines of the Federal City, for the purposes and on the conditions following:

"*The President shall have the sole power of directing the Federal City to be laid off in what manner he pleases.* He may retain any number of squares he may think proper for public improvements, or other public uses, *and the lots only* which shall be laid off shall be a joint property between the trustees on behalf of the public and each present proprietor, and the same shall be fairly and equally divided between the public and the individuals, as soon as may be, after the city shall be laid out.

"For the streets the proprietors shall receive no compensation, but for the squares or lands in any form which shall be taken for public buildings or any kind of public improvements, or uses, the proprietors whose lands shall be so taken shall receive at the rate of twenty-five pounds per acre, to be paid by the public."

On June 28, 1791 (Record, Vol. 5, p. 46), said Notley Young conveyed to Thomas Beall, son of George, and John Mackall Gantt, by deed of bargain and sale, all his lands—

"lying and being within the following limits, boundaries and lines, to wit: beginning on the east side of Rock Creek at a stone standing in the middle of the road leading from Georgetown to Bladensburgh, thence along the middle of the said road to a stone standing on the east side of the Reedy Branch of Goose Creek, thence southeasterly making an [illegible] sixty-one degrees and twenty minutes, with the meridian, to a stone standing in the road leading from Bladensburgh to the Eastern Branch Ferry, thence south to a stone eighty poles north of the East and West line already drawn from the mouth of Goose Creek to the Eastern Branch, then east parallel to the said East and West line to the Eastern Branch, then with the waters of the Eastern Branch, Potomac River, and Rock Creek, to the beginning, with their appurtenances . . .

"To have and to hold the hereby bargained and sold lands with their appurtenances to the said Thomas Beall and John Mackall Gantt, and the survivor of them, and the heirs of such survivor, forever, to and for the special trust following, and no other, that is to say, that all the said lands hereby bargained and sold, or such part thereof as may be thought necessary or proper, *be laid out together with other lands within the said limits for a Federal City with such streets, squares, parcels and lots as the President of the United States for the time being shall approve.*

"And that the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, *shall convey* to the Commissioners for the time being appointed by virtue of an act of Congress, entitled, 'An act for establishing the temporary and permanent seat of the Government of the United States,' and their successors, *for the use of the United States, forever, all the said streets, and such of the said squares, parcels and lots as the President shall deem proper, for the use of the United States.*

"And that as to the residue of the lots into which the said lands hereby bargained and sold shall have been laid out and divided, that a fair and equal division of them shall be made.

"And if no other mode of division shall be agreed on by consent of the said Notley Young and the Commissioners, for the time being, then such residue of the said lots shall be divided every other lot alternate to the said Notley Young, and it shall in that event be determined by lot whether the said Notley Young shall begin with the lot of the lowest number laid out on the said land or the following number.

"And all the said lots which may in any manner be divided or assigned to the said Notley Young shall thereupon together with any part of the said bargained and sold land, if any, which shall not have been laid out in the said city be conveyed by the

said Thomas Beall of George and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, to him, the said Notley Young, his heirs and assigns.

"And that the said other lots shall, and may be, sold at such time, or times, in such manner and on such terms and conditions as the President of the United States for the time being shall direct.

"And that the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, will, on the order or direction of the President, convey all the said lots, so sold and ordered to be conveyed, to the respective purchasers in fee-simple according to the terms and conditions of such purchases.

"And the proceeds of the sales of the said lots, when sold as aforesaid, shall in the first place be applied to the payment in money, to the said Notley Young, his executors, administrators or assigns, for all the part of the land hereby bargained and sold, which shall have been laid off in lots, squares or parcels, and appropriated as aforesaid to the use of the United States at the rate of twenty-five pounds per acre, not accounting the said streets as part thereof.

"And the said twenty-five pounds per acre being so paid or in any other manner satisfied, then the produce of the same sales, or what thereof may remain as aforesaid in money or securities of any kind, shall be paid, assigned, transferred and delivered over to the President of the United States, for the time being, as a grant of money, and to be applied for the purposes and according to the Act of Congress aforesaid.

"But the said conveyance to the said Notley Young, his heirs or assigns, as well as the conveyances to the purchasers shall be on and subject to such terms and conditions, as shall be thought

reasonable by the President for the time being, for regulating the materials and manner of the buildings and improvements on the lots generally in said city or in particular streets or parts thereof, for common convenience, safety and order; provided such terms and conditions be declared before the sales of any of the said lots under the direction of the President.

"And in trust further, and on the agreement, that he, the said Notley Young, his heirs and assigns, shall and may continue his possession and occupation of the said land hereby bargained and sold, at his and their will and pleasure until the same shall be occupied under the said appropriations for the use of the United States as aforesaid, or by purchasers, and when any lots or parcels shall be occupied under purchase or appropriations as aforesaid, then, and not till then, shall the said Notley Young relinquish his occupation thereof.

"And in trust also as to the trees, timber and woods in the premises that he, the said Notley Young, his heirs and assigns may freely cut down, take and use the same as his and their property, except such of the trees and wood growing as the President or Commissioners aforesaid may judge proper and give notice, shall be left for ornament, for which the just and reasonable value shall be paid to the said Notley Young, his executors, administrators or assigns, exclusive of the said twenty-five pounds per acre for the land.

"And in case the arrangements of the streets, lots and the like will conveniently admit of it, he, the said Notley Young, his heirs and assigns, shall, if he so desire it, possess and retain his buildings, mill, garden and graveyard, on the hereby bargained and sold lands, paying to the President at the rate of twelve pounds ten shillings per acre of the lands so retained, because of such buildings, mill, garden and graveyard, to be applied as aforesaid, and the same

shall be thereupon conveyed to the said Notley Young, his heirs and assigns, with his lots.

"But, if the arrangements of the streets, lots and the like, will not conveniently admit of such retention, and it shall become necessary to remove such buildings, mill or garden, then the said Notley Young, his executors, administrators or assigns, shall be paid the reasonable value thereof in the same manner as squares or other ground appropriated for the use of the United States are to be paid for.

"And because it may so happen by the deaths or removals of the said Thomas Beall and John Mackall Gantt, or from other causes difficulties may occur in fully perfecting the said trust by executing all the said conveyances if no eventual provision is made, it is therefore agreed and covenanted between all the said parties that the said Thomas Beall and John Mackall Gantt, or either of them, or the heirs of either of them, lawfully may, and that they at any time, at the request of the President of the United States for the time being, will convey all or any of the said lands hereby bargained and sold which shall not then have been conveyed in execution of the trusts aforesaid to such person or persons as he shall appoint in fee-simple, subject to the trusts then remaining to be executed, and to the end that the same may be perfected.

"And it is further granted and agreed by all the said parties, and each of the said parties doth for himself respectively and his heirs covenant and grant to and with the others of them that he and they shall and will, if required by the President of the United States for the time being, join in and execute any further deed or deeds for carrying into effect the trusts, purposes and true intent of this present deed."

Notley Young's riparian rights on the Potomac as owner of the Turkey Buzzard Plantation passed from him upon the execution of his deed in trust, and he did not thereafter acquire such rights by virtue of his ownership of city lots, into which the plantation had been converted under said deed.

Notley Young by this deed completely divested himself of all title to the tract conveyed, with its appurtenances; and under the trusts declared in the deed, it is evident that he could regain title to such part of the land only as might "not be included in the city," and to such of the "lots" laid out upon the land as might fall to him on the equal division of lots provided for in the deed.

All of the land conveyed by the deed was laid out in the city; and whether he became again a riparian owner, was a matter which depended entirely upon the situation of his lots with reference to the river.

The public records show that Mr. Young did not, through the proceedings had under the deed of trust, again become the owner of any land adjacent to its waters.

The President, as we have seen, first engaged Mr. L'Enfant to prepare the plan for the proposed city; he completed it in 1791, and it was the only plan of the city at the time of the first sale of lots on October 17 of that year. L'Enfant refused to permit the Commissioners to exhibit the map at said sale, and his connection wifh the affairs of the city ceased a short time thereafter; thereupon, the President directed Mr. Ellicott to prepare another plan and place it in the hands of an engraver, which was done, "intending that work and the promulgation thereof were to give it the final and regulating stamp," as the President himself subsequently declared.

The engraving was completed in October of 1792, and impressions from the plate were published and promulgated at home and abroad as the plan of the city, and it

became, as the Commissioners frequently stated, "the general rule" in their transactions; and even after the Dermott Map, which accompanied the President's directions to Beall and Gantt to convey the streets and appropriations, had been prepared, the Commissioners, February 2, 1797, say (Rec., Vol. 7, p. 2239):

> "*The Engraved Plan has been the general rule in our transactions heretofore, agreeably to which we shall form the instrument intended for the President's signature.*"

Beyond a doubt all rights of Notley Young under his deed in trust were finally fixed and determined while the Engraved Plan was the only plan of the city.

On April 9, 1793 (Record, Vol. 4, p. 1574), the Commissioners' proceedings show the adoption of regulations for the government of the surveyors in laying down and marking on the ground the squares shown on the plan.

The squares laid out along the river in Notley Young's land were squares numbered as follows, viz.:

233	390	503
S. E. of 267	391	504
270	S. of 415	505
300	W. of 471	506
329	472	S. of 506
355	473	S. of S. of 506
356		

On June 15, 1793 (Record, Vol. 7, pp. 2138–9), returns were made of Squares 472, 473, 505, 506, South of 506, and South of South of 506, as bounded on all sides, except one, by streets, and as bounded on that side "*by the Potomak River.*"

On December 14, 1793 (Record, Vol. 7, p. 2140 to 2153) further returns were made by the surveyors as to the boundaries of the squares above mentioned, and others, by which they are given, in each instance, a boundary "*by Water street.*"

On the 24th of December, 1793, and before the returns of the squares above mentioned had been acted on by them (Record, Vol. 6, p. 144), the Commissioners entered into a contract for the sale to Robert Morris and James Greenleaf of six thousand of the lots which might fall to the public on the divisions to be had with the proprietors, by which, after sundry other provisions, it was agreed—

> "that the said Robert Morris and James Greenleaf are entitled to the lots in Notley Young's land, and, of course, to the privilege of wharfing annexed thereto."

Had the returns, which gave certain of the squares a boundary "*by the Potomak River*," been approved by the Commissioners, while it would have been in derogation of the plan, and of the rights of purchasers, other than said Morris and Greenleaf, of upland lots, said Morris and Greenleaf might have selected lots in squares laid out in Young's land, which, according to said returns, would have been adjacent to the river; said returns were, however, rejected by the Commissioners, and the later ones, eliminating the Potomac River as a boundary, were adopted.

This is shown by an entry on their minutes of June 22, 1794 (Record, Vol. 4, p. 1595), which reads as follows, viz:

> "The Commissioners direct that the surveys and returns made of the part of the city in Mr. Young's land, adjoining the Potomak, leaving Water street according to the design of the plan of the city, be acted on instead of the returns made by Major Ellicott in some instances bounded with and in others near the water."

On July 12, 1794, the surveyor reports to the Commissioners that "Water street on the Potomac River is adjusted and bounded."

Under date of January 31, 1797 (Record, Vol. 7, p. 2239), the Commissioners inform the President that they have—

> "at length got through Messrs. Morris and Nicholson's selection which has been a work of much time and trouble;"

Nicholson had succeeded to the interest of Greenleaf in the contract. The purchasers took under their contract, in so far as their right of selection in squares laid off in Notley Young's land was concerned, according to the description of the squares which gave them in every instance a boundary on Water Street.

On October 18, 1794, (Record, Vol. 6, p. 149), as shown by the Commissioners' minutes, a division was had between the public and Notley Young of a great number of squares laid out upon his land in which, of the squares along the river, 270, 300, 503 and 504, went to the public; and 233, S. (S. E.) of 267, W. of 471, 472, S. of 506 and S. of S. of 506 went to said Notley Young. The division is by the superficial area in square feet of the several squares.

By the terms of his deed in trust, Notley Young was entitled, if he so desired, and in case the arrangements of the streets would conveniently admit of it, to possess and retain—

> "his buildings, mill, garden and graveyard, in the hereby bargained and sold lands paying to the President at the rate of twelve pounds ten shillings per acre for the same."

Under date of August 9, 1796 (Record, Vol. 7, p. 2233), the Commissioners addressed a communicaton to Mr. Young stating that:

> "The board have had your plat before them and think it will be necessary to have the several squares in which your buildings, garden and graveyards are situated, laid down by the city surveyor, and the space which these several objects occupy particularly delineated on the face of the plat to be returned with a description of the several buildings.
>
> "Preparatory to deciding on the question, we have given directions to Mr. Ralston to have this done."

Between pages 398 and 399 of Volume 6, of the Record, will be found two plats which show Mr. Young's improvements, etc., one of which gives "Water Street" as one of the boundaries of the squares.

The Commissioners' minutes of December 3, 1796 (Record, Vol. 6, p. 195), contain the following entry:

> "The Board having on the 30th ultimo taken into consideration the claims of such of the original proprietors in the city of Washington, and those claiming under them, as had made known their desire to retain their buildings and graveyards; thereupon ordered, that Notley Young, one of the original proprietors of the city of Washington, having expressed his desire to retain his buildings, garden and graveyards in the said city, and the Commissioners being of opinion that the same (except such as are situated on the streets) may be retained consistently with the arrangement of the streets and lots, it is therefore agreed by the Commissioners that the buildings, garden and graveyards of the said Notley Young in the said city, except as before excepted, together with the Squares No. 329, 355, 356, 389, 390, 391, 415, S. of 415 and 439, shall remain to him as original proprietor, in full of the land to be conveyed, together with his buildings and improvements aforesaid, agreeably to the terms of his deed of trust."

On page 2245–6 of volume 7 of the Record will be found an account, stated with Mr. Young, under date of December 3, 1796, charging him with one-half of the area of said squares at the rate of twelve pounds ten shillings per acre, which is allowed as an offset to the amount due him at the rate of twenty-five pounds per acre for the portion of his land, "*measured to high water-mark*," included in the public appropriation now known as the Arsenal grounds; the account, also, shows the amount due him for the part of the President's Park included in his land, and bounded "on the southwest *by the high water-mark of Potomak*."

Partitions With Notley Young Under the Deed In Trust did not Invest him with Riparian Rights.

The squares in Young's land which were assigned to him on divisions with the Commissioners, and relinquished to him on account of his improvements, etc., agreeably to the terms of the deed of trust, had fronts on Water Street, respectively, as follows (Rec., Vol. pp. 2140–54):

Square.	Feet.	In.
233	471	11
S. E. of 267	57	10
329	234	9
356	146	3
390	120	1
391	387	4
S. of 415	263	1
W. of 471	281	10
472	314	3
505	393	3
506	381	10
S. of 506	363	6
S. of S. of 506	266	5

The entire frontage of the squares on Water Street thus assigned to Young on the partitions is 3682 feet 4 inches.

The squares in his land which were assigned to the public in the partitions had fronts on Water Street, respectively, as follows:

Square	Feet.	In.
270	255	1
300	359	9
473	633	4
503	212	6
504	272	

The entire frontage of the squares on Water Street thus assigned to the public is 1732 feet 8 inches; from which it appears that, in the transactions, Young obtained, in such

frontage, upwards of double the number of feet which were obtained by the public.

Under the terms of the deed in trust Young was to be paid, by the public, at the rate of 25 pounds per acre, for such quantity of his land as was selected "for the use of the United States;" it was also provided in said deed that if he desired to retain the squares in which his improvements, etc., fell, he should be permitted to do so by paying therefor at one-half of the rate, for the one-half of such squares to which the public was entitled, and his account in respect of such squares was stated by square feet, as in fact were his accounts in regard to all other squares.

Nothing could more conclusively demonstrate that in the partitions it was not considered that such frontage carried with it wharfing rights.

Thus far it has been shown that none of the squares laid out under the deed, in Notley Young's land, as finally adopted, were laid out with the river as a boundary, but that they were laid out in accordance with the plan of the city; and that in the instruments by which the partitions were effected there is nothing to indicate that wharfing rights or privileges were to accompany the ownership of the portions of the squares fronting on Water street.

The rights of Mr. Young thus became definitely fixed and determined before the Dermott Plan appeared, and, while the Engraved Plan was the only one in use; the rights of Mr. Young and of the public, thus settled and determined, could not be affected by a plan subsequently appearing.

All the sales of lots which had been made throughout the city, prior to the appearance of the Dermott Plan of 1797, were made with reference to the Engraved Plan of 1792. The adoption of the Engraved Plan, and the making of such sales with reference to it, would, even under other circumstances, have operated as a dedication to the public of the streets shown upon it; such purchasers obtained

easements and rights of way over all such streets, which could only be qualified or interfered with by legislative enactment. That it was in the power of Mr. Dermott or of the Commissioners, or of the President, to affect these rights, through Mr. Dermott's map,even if they so intended, can not be admitted.

All the defendants included in this class are the owners of lots in the line of squares laid out upon the land so conveyed by said Young and which face the river, and are located between the Arsenal grounds and the bridge which crosses the river at the foot of Maryland avenue; they claim as a riparian right, incident to such ownership of said lots, to be entitled to the exclusive privilege of wharfage into the river opposite their respective lots, and from the water side of the street known as Water street, which intervenes between said squares and the river.

The squares and parts of squares owned by the appellants falling in this class, and to which wharfing rights are claimed to be incident or appurtenant, and fronting on Water street, are as follows:

	SQUARE.
The American Ice Company	270
Edward W. Willis	S. E. of 267
(*By substitution for Arsenius I. Harvey*).	
J. Harrison Johnson & Co	300
William R. Riley (widow of)	329
William R. and Thomas W. Riley	355
The Great Falls Ice Company	356
(*By substitution for Powell M. Bradley, et al.*).	
James L. and James F. Barbour	part of 390
(*By substitution for Powell M. Bradley, et al.*).	
The Independent Ice Company	part of 391
(*By substitution for Powell M. Bradley, et al.*).	
Heirs of Mary A. S. Kimmell	part of 391
Daniel S. Evans	S. of 415
William W. Rapley	W. of 471

Moncure Robinson, *et al.*	472
The Washington Steamboat Company Limited.	473
Moncure Robinson, *et al.*	part of 503
Avarilla Lambert, Mary Jane Van Riswick, and Martina Carr. (*Heirs of John Van Riswick*).	part of 503

As appears from the transactions above noted had between said Young and the Commissioners, some of the last mentioned squares became the property of the said Young, and others passed to the public; the appellants trace title to one or the other as the original owner of the square.

No wharfing rights having vested in said Young as owner of the squares assigned to him, none could pass by any grant from him or his assignees or descendants, to the appellants, to whom he (said Young), as the original owner of particular squares, is a source of title; and those who trace title from the United States as the original owner of particular squares are in no better position; none of the instruments by which the United States parted with its title show a grant of such rights.

Claims of Appellants Willis, American Ice Company, Riley, Barbour, Great Falls Ice Company, Van Riswick's Heirs, Johnson Estate and Kimmel Heirs.

It is to be observed that all of the documents referred to in the brief for Willis, American Ice Company, and other appellants, represented by Messrs. Carlisle, Johnson and Lambert, bear a date subsequent to the steps, acts and proceedings by which all the rights of Mr. Young and of the United States under his deed in trust, to said squares had become fixed and determined, and also subsequent to the appearance of the Dermott map, and consequently; they can have no bearing upon such rights.

The Dermott Plan could not, therefore, in view of the circumstances, supersede the prior plan under which the operations of the city had been conducted for the first six years; the real office of the Dermott Plan has been shown

on pages 140 to 145 of this brief; the preparation of the Dermott Plan began with the directions given him "to prepare a plan of the city with every public appropriation clearly and distinctly delineated"; and while the Commissioners had under consideration the preparation of "the instrument" calling upon the trustees, Beall and Gantt, to convey the streets and public appropriations, they stated to the President in a letter dated January 2, 1797:

> "It is by no means our wish that any alteration should be made in the published plan of the city. It may with great truth be asserted that every change occasions infinite trouble to the Commissioners and creates confusion with the proprietors."

In a letter to Davidson under date of February 2, 1797, they say—

> "The Engraved Plan has been the general rule in our transactions heretofore, agreeably to which we shall form the instrument intended for the President's signature."

It is preposterous to suppose, in view of such declarations, that either the President or the Commissioners intended that the Dermott Plan should supersede the Engraved Plan.

In other declarations of the Commissioners the Dermott Plan is called "the Map of the Public Appropriations;" the map itself is variant from "the instrument" to which it is said to have been attached, for in the description of Appropriation 17 (the President's Square) Canal street, which is given as a southern boundary, does not appear on the map at all; and square south of Square 173, one of the squares on David Burnes' land, which was surveyed and returned July 16, 1793, is not numbered upon it nor even fully outlined; and the President in a letter to Munroe, the superintendent of the city, says of the Dermott plan—

> "The plan and declaration of 1797 were final as far as they went, but even they left many parts unfinished, some of which remain to be still declared."

How unfinished, if not according to the requirments of some previous design?

The King Plan of 1803, which is also attacked in said brief and the series of plans submitted by him to the Commissioners in 1797, indicate simply a carrying into effect of the design adopted by the President in the Engravəd Plan.

Mr. King, in his letter to the President of September 25, 1803, says (Record, Vol. 6, p. 306):

> "That there should be one continued street on the water side of the city in which the others terminate beyond which no house or building, which may impede the access of the air, or be the cause of a nuisance, will be allowed, seems of indispensable necessity in this climate and the permanent seat of government."

In the same letter he further says (Ib., p. 307):

> "For although the squares on the ground and vicinity of the river, as they have been divided and sold, differ in many respects from the Engraved Plan, *yet that plan establishes the principle of a Water street*, beyond which wharves only, but no buildings, can be erected."

Again he says (Ib., p. 308):

> "Perfecting this part of the plan so as to leave nothing for conjecture, litigation or doubt *in the manner which shall most accord with the published plans*, secure the health of the city, and afford the most general convenience to the merchants, requires immediate attention."

The plan of Mr. King's of 1803 secures these results.

Rights Claimed are Settled Adversely to Appellants by the Decision in the Steamboat Cases, Reported in 109 U. S.

The right here claimed was the sole matter under consideration in the Steamboat Cases in 109 U. S. 672; and it was there held that no rights of wharfage were connected with

the use and enjoyment of said lots, and that the United States were the owners in fee of said Water street and were in the enjoyment of all the riparian rights which were attached to that property by the compact of 1785, between Maryland and Virginia, and by the Maryland Act of Cession of December 19, 1791, which authorized the Commissioners appointed under the Act of Congress of July 16, 1790, for establishing the permanent seat of the Government of the United States, to license the building of wharves on the Potomac River.

But the appellants, Willis and others, represented by Messrs. Carlisle, Johnson, and Lambert, seek to evade the force and effect of this decision by urging that there are facts in the present record which were not before the court in the Steamboat Cases, by reason of which that decision "is neither decisive of their rights nor a controlling authority upon the questions in this case."

In the brief filed in their behalf they deny (pp. 6–7):

1. That the street known as, and commonly called, Water street, is or ever was the property in fee, or otherwise, of the United States.

2. That the United States has any riparian rights or privileges as an incident to the land on which said Water street is constructed.

3. They affirm that said Water street was never laid out or delineated upon any lawful plan of the city, and was never approved as such by the President of the United States.

4. They affirm that by virtue of the execution of the trusts in the deed of said Young to Beall and Gantt (which deed they say is the only source of title of the United States) the title to the land upon which said street is constructed, and to the shore of the Potomac river, adjoining the same, remained to said Young—

> "as in his first and former estate and by lawful transmission as to the land and water claimed by them has become vested in these appellants, and that

> he and those claiming under him have been in the possession ever since before the Declaration of Independence."

As underlying these negative and affirmative propositions of said appellants, it is said (brief, p. 2)—

> "There is no judicial decision as to what was the plan of the city of Washington, within the true intent and meaning of the deed of trust, and the question is one which has never been examined and decided by this court."

And again (brief, p. 28), in regard to the Engraved Plan:

> "This Map, while it was used for some purposes and commended in many respects by General Washington, was never formally or expressly approved by him on any occasion."

In response to all this, we say, that the L'Enfant Plan of 1791, the Ellicott Plan of 1792, the Dermott Plan of 1797, and the King Plan of 1803 differ in no material particular, in so far as the Water street along the Potomac and the squares facing it in Notley Young's land are concerned, as is manifest upon an inspection of them; and that they were before this court in the Steamboat Cases admits of no doubt whatever upon a reading of the opinion of the court and an examination of the record in said cases.

The location of the Squares 472, 473 and 503, as incident to the ownership of which the claim of wharfing rights was made in those cases, could only be determined by reference to the plan of the city; it was specifically averred in the answers of the respective appellees that said squares were not entitled to such rights, because such rights were "in fact appurtenant to Water street as indicated on the plat of the city of Washington," and each answer further specifically—

> "denies that any riparian privileges are appurtenant to Square 472 on the plan of the city of Washington."
>
> Record, Steamboat Cases, p. 28.

The contract, which was in evidence in said cases, between the public authorities and Morris and Greenleaf for the sale to the latter of the public lots in certain squares, and among them squares in Notley Young's land, is based upon that plan.

Witnesses were examined in those cases in regard to the L'Enfant plan, the Engraved Plan, and the King Plan of the city (Ib. p. 91); and also in regard to the Dermott Plan (Ib. p. 73–4); the latter was given in evidence (Ib. p. 73); a section of the Engraved Plan, showing the squares of the city along the river from a point near Maryland avenue to the line of the Arsenal grounds, was given in evidence on behalf of the appellants, and is reproduced in that Record (Ib. p. 114); and a copy of the Engraved Plan was given in evidence by the defendant, marked "Exhibit U. No. 22" (Ib. p. 507); and the "plan of the city" is frequently referred to in the documents from the public records given in evidence.

While the clerk of this court has noted the fact of the absence from the Record of some of the maps referred to by the witnesses, he has *not* noted that "Exhibit U. No. 22" was missing; and the section of the Engraved Plan on page 114 speaks, of course, for itself. It was, in fact, impossible for the court to deal with the subject of a Water street, and the riparian privileges claimed, without judicially deciding upon the plan of the city to which that street owed its existence.

As we have shown (pages 120 to 150 of this brief), the Ellicott Plan of 1792 was approved by the President, engraved by his order and by him promulgated as the PLAN OF THE CITY; that it was the general rule in the transactions of the Commissioners; and that the office of subsequent maps was simply to show the progress made in following its design upon the ground.

The observations of this court in the case of Van Ness *vs.* The City of Washington and United States, 4 Pet. 284, as

to the import and effect of one of the deeds in trust, are equally applicable to the deed of Notley Young:

> "Now, it is important to observe, that the object of the indenture to Beall and Gantt in 1791 was to carry into effect the preliminary agreement entered into by the proprietors. There is no pretence to say that that indenture has not fully carried that agreement into effect. . . . We must take the indenture, therefore, as we find it, as a complete execution of the preliminary agreement, and as expressing the true intent and definitive object of the parties. The preliminary agreement then became, upon the execution of the indenture, *functus officio*, and was merged in the more formal and solemn stipulations of the latter. It was no longer executory, but executed. . . . The streets and public squares are declared to be conveyed 'for the use of the United States forever.' These are the very words which by law are required to vest an absolute unconditional fee-simple in the United States."

The preliminary agreement of the proprietors referred to by the court is dated March 30, 1791, and contains this provision:

> "*The President shall have the sole power of directing the Federal city to be laid off in what manner he pleases.*"

Again, the court say (p. 279):

> "It is not very material, in our opinion, to decide what was the technical character of the grants made to the Government; whether they are to be deemed mere donations or purchases. The grants were made for the foundation of a Federal city, and the public faith was necessarily pledged when the grants were accepted to found such a city. *The very agreement to found a city was of itself a most valuable consideration for these grants.* It changed the nature and value of the property of the proprietors to an almost incalculable extent. *The land was no longer to be devoted to mere agricultural purposes; but acquired the extraordinary value of city lots.* In proportion to the

success of the city would be the enhancement of this value; and it required scarcely any aid from the imagination to foresee that this act of the Government would soon convert the narrow income of farms into solid opulence. The proprietors so considered it.

"In this very agreement they state the motive of their proceedings in a plain and intelligible manner. *It is not a mere gratuitous donation from motives of generosity or public spirit; but in consideration of the great benefits they expect to derive from having the Federal city laid off upon their lands.* . . . Neither considered it a case where all was benefit on one side and all sacrifice on the other. It was in no just sense a case of charity; and never was so treated in the negotiations of the parties. But, as has been already said, it is not in our view material whether it be considered as a donation or a purchase; for in each case it was for the foundation of a city."

The Non-Conveyance of the Streets, by Beall and Gantt, Trustees, is Immaterial.

Appellants can find no support for their contentions in the point, that in the Van Ness case the court erroneously assumed that the trustees, Beall and Gantt, had, in the execution of the trust, conveyed to the United States the streets of the city and the several large parcels of land denominated appropriations which had been selected for the use of the United States; whereas the deed executed by them, dated November 30, 1796 (Record, Vol. 4, p. 1395), only conveyed to the Commisioners—

> "all that part of the land vested in them which has been laid off into squares, parcels, or lots for buildings and now remaining so laid off in the city of Washington,"

except—

> "such parts thereof which may have been heretofore conveyed under virtue of the trusts in the said deeds,"

subject to the trusts which have not already been executed by the said Beall and Gantt.

In an equity court the failure of the trustees to execute such deed, in so far as the rights of the *cestui que trust* are concerned, is immaterial, upon the principle that the court will consider that as having been done which ought to have been done.

In the case of O'Neal's Lessee *vs.* Joel Brown, 1 Cranch C. C. 69, which was an action of ejectment for a lot in the city of Washington, the court held that by the Acts of Maryland of 1791, Ch. 45, Sec. 2, and 1793, Ch. 58, an outstanding title in Beall and Gantt, trustees, could not be set up against the purchaser of a lot from the Commissioners, and—

> "that when the right of *cestui que trust* accrued, the legal title by virtue of the Act of 1793, vested, and followed the use in a manner analogous to the operation of the English statute of uses."

Attorney General Cushing on August 1, 1855, rendered an opinion, to the Secretary of the Interior, upon the question of the authority of the Commissioner of Public Buildings, as the successor of the early Commissioners of the city, to sell and convey lots in the city of Washington in which the legislation of the State of Maryland and of the United States affecting the deeds in trust to Beall and Gantt was elaborately considered. After reciting the Act of July 16, 1790, and the deeds of 1791 of the original proprietors of lands in the city of Washington, he says (Ib. p. 2280):

> "It would seem that the plan at this time was that the *trustees* should be the persons through whom to make title, in case of any sale of city lots to individuals, for they were to convey in fee-simple to any nominee of the President. The trustees were also to receive the proceeds of sale, and, after deducting the first cost of the lands therefrom, to pay the balance to the President, according to the uses of the Act of 1790, that is, the provision of buildings for

the accommodation of Congress, the President, and the public offices of the government.

"But all this underwent essential change by virtue of an act of the Legislature of Maryland, passed the 19th of December, 1791 (Davis' Dis. Col. Acts, p. 64; Kilty's Md. Stat., Vol. 2, Ch. 45).

"The preamble of this important act recites the previous establishment of the seat of Government in the District of Columbia;—the conveyance, by the original proprietors, of the site thereof to trustees in part for the direct use of the United States, and in part 'to be sold to raise money as a donation' to be employed according to the provisions of the Act of Congress of 1790, the proprietors giving up one-half of certain land to be thus sold, 'and the money thence arising to be applied as a donation as aforesaid';—and it states, among other inducements of the act, that an incontrovertible title ought to be made to the purchasers under public sanction—after which it proceeds to enact as follows:

"'Sec. 5. *That all the squares, lots, pieces, and parcels of land within the said city, which have been, or shall be, appropriated for the use of the United States, and also the streets, shall remain and be for the use of the United States; and all the lots and* parcels which have been, or shall be, sold to raise money as a donation, as aforesaid, shall remain, and be, to the purchasers according to the terms and conditions of their respective purchases.'

"This provision seems to have been designed to have the legal effect to vest in the United States the fee of all the lots conveyed for their use, and also to perfect the title of purchasers to whom sales had been or should be made according to the terms of the act of Congress.

"The 7th section authorizes the Commissioners, appointed under the Act of 1790, to appoint a clerk for recording deeds of land within said District in a book to be provided by him for that purpose, and enacts that he shall—

'*In the same book make due entries of all divisions and allotments of lands and lots made by the Commissioners in pursuance of this act,* and certificates granted

by them of sales, and the purchase-money having been paid, with a proper alphabet in the same book of deeds and entries aforesaid, and the same book carefully preserve and deliver over to the Commissioners aforesaid, or to their successors, or such person or persons as Congress shall hereafter appoint.'

"John M. Gantt, one of the trustees, was appointed such clerk by said Commissioners, and the books thus authorized and kept by him now constitute the first volume of the land records of the County of Washington. No reconveyance appears to have been made, by the trustees, to the original grantors of the lands which they were entitled to under the trust deed; but the 9th section of this act provided—

"'That the Commissioners (under the Act of Congress of 1790), aforesaid, or some two of them, shall direct any entry to be made in the said record book of every allotment and assignment to the respective proprietors in pursuance of this act.'

"These entries of allotment, and certificates thereto, appear to constitute the evidence of title of the original grantors, of the portions to which they were entitled under the provisions of their deeds to the trustees, Beall and Gantt."

Nicholas King and his plan of 1803, have been made the subject of animadversion by counsel for the appellants in the brief to which we have referred.

In reply to this it may be said that no impartial critic can read the papers of Mr. King which have been introduced in evidence without coming to the conclusion that he was a man of great intelligence and capacity, both in and out of his profession.

The record in this case shows him not only in the light of a public official in connection with the affairs of the city, but also in the light of a private individual in the employ of, and attending to the concerns of those who had pecuniary and property interests which would be largely affected by the administration of those affairs, and it may be truly said that his advice and recommendations under all circumstances

were characterized by the utmost candor, and had for their object simply the advancement of the city's welfare; he was not a lawyer and never pretended to advise upon purely legal subjects; it was not unnatural, however, that as an intelligent layman, he should in discussing some of the acts of the Commissioners, express his surprise that they should have done such acts under claim of lawful authority, and have declined to do others of a similar nature because of the lack of such authority.

It is said that there is no warrant for the preparation of his plan of 1803, that is that no order or direction can be found of record from his official superior, the Superintendent of the City, or from the President, under whose direction and control the superintendent in attending to the affairs of the city acted.

What warrant was required? The plan of Mr. King of 1803, was prepared in conformity with the views expressed by him in his letter to the President. It contained no startling innovations upon, or departures from the Engraved Plan; on the contrary his plan was and is manifestly but a reasonable and proper suggestion as to the best method, as a matter of administrative duty, of carrying into effect upon the ground, what remained unexecuted of that plan.

Mr. Forsyth, the District Surveyor, certainly a competent witness, testified that during his experience, extending over a period of forty years, in connection with the surveying departments of the late corporation of the City of Washington, and of its successor, the District of Columbia, and of the officers of the United States charged with the execution of the duties which had devolved upon the early Commissioners of the city, the King Plan of 1803 had been regarded and accepted, and acted upon, as a standard map of the city, and that it had been followed in all the operations of the city in his recollection, and that he had been informed by those who had preceded him that it had been followed by them. This fact of itself is a most satisfactory proof of its

validity. The functions of the early Commissioners were continued in other agencies of the Government by whom they have been succeeded, under the legislation of Congress; their powers and authorities have been simply distributed between the City and District Corporations, and Superintendents, Commissioners of Public Buildings, and the Chief of Engineers, by whom the plan of Mr. King has been followed and developed.

It did not require a proclamation of the President or the great seal of the United States to give validity to this work of Mr. King. It was said by the Commissioners in 1797 that the Engraved Plan—

> "required the doing of many acts to carry it into effect such as the laying off and bounding a water street, on the waters which surround the city"—

and the plan of Mr. King was and is a proper practical expression with reference to topographical considerations, of what was already existent in theory in the Engraved Plan.

Mr. King became in 1802, the city surveyor, the head and chief of the office, under the Superintendent who had succeeded the early Commissioners and he clearly had the right in the performance of the duties of his office to project the plan, and its approval by competent authority is to be inferred from the fact that it has been acted upon as a valid plan, and its features carried into effect upon the ground, for such a length of time; furthermore it is evident that this map was being prepared under official sanction as early as 1797; Mr. Davidson in a letter to the Commissioners of August 14, of that year, refers to "Mr. King's elegant and descriptive work now going forward in your office"; Capt. Stewart, the custodian of the city records, testifies that he knew of no work, other than the sixteen sheets comprising the King Plan which answered the description of an "elegant and descriptive work," of Mr. King.

From the beginning every one had notice that the plan formulated, under the deeds in trust, provided for a water

street along the shores of the city on the Potomac and Eastern Branch; "the principle" of such a street, as stated by Mr. King, had been established by that plan; all sales of lots in the city had been made with reference to it and to the assurance it gave that such a street would be laid out; and there was and is no reason under the circumstances why the rights of the United States and those purchasers of lots in all other parts of the city should have been or should be disregarded because those who became the owners of lots near the water found or find it to be more in accordance with their interests that the legal existence of such a street as a part of the plan of the city should be denied.

The sooner it is understood, that a water street along the entire shores of the Potomac and Eastern Branch in the city, is a matter of legal right, according to the deeds of trust and the plan of the city, and the sooner Congress provides for the actual laying out of it on the ground, the better it will be, as Nicholas Young said 100 years ago, for 'the future health of the city."

Appended to this brief will be found copies of Sections 2, 5 and 10 of the King Plan of 1803, which show the entire river front from Rock Creek to the Arsenal point.

The plat of square S. of S. of 506, on page 2154 of Volume 7 of the Record was furnished by Captain Stewart, custodian of the early city records, and purports to have been prepared from the King Portfolio Plan of 1803. One of the boundaries of the square as shown on this plat reads: "Water street or Potomac River." The addition of the words "or Potomac River" to this description of the boundary of the square is erroneous.

Captain Stewart testifies in regard to it as follows:

> "There is no certificate or return of survey of that square now in the records of this office. The square is now included in the Arsenal grounds. The only means of determining its former location, boundaries and dimensions is by the King portfolio map of

1803. There is no plat of the square or entry of any kind about it in the Register of Squares in this office; and I find, upon examination, that there are none in the office of the District surveyor.

"Q. By whom was the plat of square south of square south of Square 506, which appears on folio 3632 (page 2154), prepared?

"A. I prepared several plats of squares, at your request, from the records of this office, this square among the number; I had to take this one from the King plan.

"Q. Do you find a street on the King plat marked 'Water street or Potomac River,' as you have given it?

"A. No, not exactly as I have given it; but I found 'Water street' and 'Potomac River' on the side of the square towards the river and I put both on the plat."

Reference to the King Map, from which Captain Stewart prepared the plat of the square, shows only a boundary on Water street.

The Particular Claim of Appellant, Edward M. Willis, as Successor in Title to Arsenius I. Harvey.

The claim of the appellant, Edward M. Willis, as successor in title of Arsenius I. Harvey, who appeared and answered the bill of complaint, is stated in the brief (page 93) on behalf of said Willis and others, appellants, to differ in a single feature only from the claims of such other appellants; the point of difference being—

> "that no Water street or other street does in fact exist, or ever has existed, between the square [southeast of 267] and the river."

In the original answer of said Harvey he claimed according to a plat, Exhibit "A. I. H. No. 1," thereto (Record, Vol. 1, between pp. 242 and 243), which plat exhibited

a triangle beginning at the intersection of Maryland avenue and Thirteen-and-a-half street and extending along the line of said avenue and street to the Potomac River; of which land he averred in his answer—

> "that he and those through whom he claims have been in the actual, visible, notorious, hostile and continuous possession"

since 1793; no color or claim of title other than such as is to be inferred from occupation is set forth.

In an amended answer he sets forth particularly by metes and bounds a description of the tract claimed, and to this amended answer there is a plat attached marked "Exhibit A. I. H. No. 2" (Record, Vol. 1, pp. 246–8), and by virtue of such alleged ownership he claims—

> "the riparian rights and privileges ordinarily incident to the possession of land bordering upon navigable waters;"

the amended answer then avers that the land so claimed by the defendant is part of a tract formerly known as Duddington Pasture, which was conveyed by Ann Young to Notley Young in 1762, and that defendant claims—

> "by sundry good and sufficient deeds, devises and descents, the portion of the said part of Duddington Pasture lying on the banks of the River Potomac"

described in his said amended answer.

To maintain the claim made by the defendant, evidence was given in his behalf of the deed from Notley Young to Beall and Gantt, in trust for the Federal City, and the various instruments deducing said Young's title from the Proprietary of Maryland.

Within the limits of the land claimed by Harvey in his answers is included the square known as square southeast of Square 267, one of the squares laid off in said

Young's land. The plat of this square will be found on page 2140 of volume 7 of the Record, which shows its dimensions to be as follows:

On Maryland avenue, 148 feet 1 inch;

On Thirteen-and-a-half street, 86 feet;

On E street south, 94 feet;

On Water street, 57 feet 10 inches.

It was stipulated by counsel for the United States that at the time of the institution of this suit the fee-simple title to the square known as square southeast of Square 267, and shown on the Dermott Plan and King Portfolio plats of the city, was vested in said Harvey, and that it had been by said Harvey conveyed to said Willis; it was also stipulated that said square is embraced within the limits of the land claimed by said Harvey in his answers.

There was no evidence whatever introduced in behalf of defendant showing, or tending to show, any record title in him to any part of the land he claimed exterior to the bounds of the said square southeast of 267; although the fact is, as shown by the "Exhibit A. I. H. No. 2," that there is a considerable space of ground between the southwesterly line of said square on Water street and the river, and forming part of Water street, which, together with a part of E street south, is included within the lines of the land claimed by said Harvey.

The defendant Harvey testified, in substance (Record, Vol. 4, p. 194), on cross-examination, that his recollection of the locality extended back to 1836, and (Ib., p. 1945) that no land had been reclaimed from the river at the point since that time; that there was no difference between the line of the river at the present time and its line in 1836; that the line is now just where it was at that time. He further testified that Clement McWilliams once owned the property and that his name and that of Athanasius Mudd were mentioned in his abstract of title, and that (Ib., p.

1946) Water street had not been extended beyond the line of Thirteen-and-a-half street; that the corporation of the city of Washington had attempted to extend Water street through there, and that the idea had been abandoned—

> "for the reason that they could go no farther than 13½ street, because old man Notley Young had reserved from C street down to the river west of 13½ street as his fishing shore."

He further testified (Ib., p. 1936–7) that along the Maryland avenue side there was a board fence with an opening fifteen or twenty feet wide at the end, and that on the Thirteenth-and-a-half street side there was a line of cord wood which did not run all the way to the river, but left an open space of thirty feet or more, and that with the exception of these openings the rest of the space had been enclosed from 1836, and (Ib., p. 1947) that the opening on the Maryland avenue side was left "for persons to pass through and the other opening for vehicles."

The origin of the possession testified to by Mr. Harvey is explained by an ordinance of the late corporation of the City of Washington (Record, Vol. 7, p. 2317–8), approved June 8, 1826, entitled "An Act making appropriations for improvements in the Second Ward." The first section of this ordinance appropriated a sum of money for improving Thirteenth-and-a-half street west, from C street south to Maryland avenue, and for improving Fourteenth street west, from C street south to Maryland avenue; the second section provides:

> "That the earth, or so much thereof as may be necessary, shall be deposited on and at the intersection of Maryland avenue, E street south, and Water street, when a good and sufficient stone wall shall be built by Nathan Smith, Athanasius Mudd, and Clement McWilliams, petitioners for the improvements above provided for, or their legal representatives, at their individual expense, upon the south line of Water street, from the west line of their

water privilege to the Washington Bridge, or in such other direction as may be approved by the Mayor. *Provided, however, that when the corporation think proper to take possession of the same, they shall refund to the persons before named, or their legal representatives, the amount which may be awarded them by two appraisers, one to be appointed by the Mayor and one by themselves.*"

John P. Van Ness, then the Mayor, sent, September 21, 1832, a communication (Record, Vol. 7, p. 2326) to the Board of Aldermen and Board of Common Council, calling attention to the above ordinance of June 26, 1826, and then adding:

> "*Now, it appears that for several years past the said individuals, or their representatives or successors, having built the wall, have held and used the same and the neighboring public grounds*, being the intersection of streets or an open space, very much to their own profit."

The mayor then states that an application is now made by the engineer, Col. Kearney, and the agent, Mr. Davis, "in rebuilding the bridge" for the use of those grounds, for workshops, storing materials, etc., "during the progress of that important work"; that the parties offered to advance the amount that may be awarded the claimants, under the second section of the ordinance, "to be repaid hereafter."

In response to this communication an ordinance was passed September 24, 1832 (Ib., p. 2327), by which the mayor was authorized to appoint one appraiser and—

> "pay the amount of any award which may be made to Nathan Smith, Athanasius Mudd, and Clement McWilliams, or their legal representatives,"

agreeably to the ordinance of June 8, 1826; and—

> "to permit the ground made at the intersection of Maryland avenue, E street south, and Water street, to be used by the agent of the United States for building the Potomac Bridge," etc.

It is evident upon this state of facts that, as to the land claimed forming part of the beds of Water street and E street and the river adjoining them, neither Mr. Harvey nor Mr. Willis, his successor, show any title as against the United States.

The Particular Claim of Appellant, William W. Rapley.

The appellant, William W. Rapley, sets forth in his answer (Record, Vol. 1, p. 256) that he is and has been ever since 1864 the owner in fee of the whole of the Square 471 [should be west of Square 471]—

> "together with the water and riparian rights and wharf and other privileges and easements thereunto appertaining and lawfully belonging, he having acquired the same by purchase, by mesne conveyance, from one Notley Young, the original proprietor thereof;"

that said square of ground is bounded on the east by Seventh street, on the north by K street, on the west by Eighth street—

> "and on the south and southwest by what is alleged to be a public street, called Water street, and the Potomac River."

The plat of this square, introduced in the evidence given on behalf of said defendant (Record, Vol. 3, p. 1044) shows that the square has a boundary on Water street, but none on the Potomac River as averred in the answer.

The defendant shows no grant from any competent source for any land exterior to the limits of said square; and what has been heretofore said in regard to other claimants of riparian privileges on the southwesterly side of Water street, opposite his square, is equally applicable to the case of this appellant.

In his deposition (Record, Vol. 3, p. 1116) the appellant testified:

> "Q. By virtue of your ownership of this square, what claim have you made to the riparian rights to the river in front of the square?
>
> "A. I have always claimed it. When I bought the square it was a question that did not seem to be doubted. I bought it with the idea that it carried the riparian rights with it, and everybody was using the river front with that idea."

And on cross-examination (Ib., p. 1120):

> "X-Q. You leased or rented at one time, did you not, to S. P. Brown?
>
> "A. I did; to him and his son Austin.
>
> "X-Q. And you instituted some suits to recover instalments of the rent due by him, did you not?
>
> "A. Yes, sir.
>
> "X-Q. Did not Mr. Brown, after a while, set up title in himself to an undivided half of the square and seek to defeat your right to recover the rents on that account?
>
> "A. Yes, sir; I do not know about it being one-half, but five-twelfths, I believe.
>
> "X-Q. And certain proceedings were had in the equity court between yourself and Mr. Brown, growing out of the conflict of claims and pretensions of yourself and Mr. Brown in the premises, were there not?
>
> "A. Yes, sir.
>
> "(The witness' attention is here called to the proceedings had in equity cause No. 1836, Docket 10, of the Supreme Court of the District of Columbia, between S. P. Brown and son and W. W. Rapley; and the original bill in said cause, filed November 16, 1869, is read to him.)
>
> "X-Q. Do you remember the filing of that bill?
>
> "A. Yes, sir.
>
> "X-Q. Look at this paper, purporting to be your answer to the bill of complaint in that case, and tell me whether that is your signature thereto?
>
> "A. Yes, sir.

"X-Q. According to that answer, to which your attention has been called, you claimed and contended that Mr. Brown was simply your tenant as to a portion of the wharf property, did you not?

"A. Yes, sir; when Mr. Brown went there that square was just a commons and I leased him the wharves, and I had no objection to his piling his lumber on there; but when he set up a claim for part of the rents . . . then I contended that he went there simply as my tenant, and denied his right to have any interest in the rents. In regard to the apparent inconsistency between the claim set up in my answer to this suit and the answer which I made to the bill in equity in the suit to which my attention has just been called, I have only this to say: That at the time I bought the square I was under the impression that the wharf rights on the other side belonged to me. After I had bought them the talk among the owners of property along the river front led me to think that I might be in error about this; and, hence, in order to better my position in the premises, I obtained the license from the chief of engineers. At the time I made that answer I set up that fact as an independent defense to that suit."

The attention of the witness was then called to the bill of complaint filed on November 15, 1869, by Samuel P. and Austin P. Brown against him for an account and injunction in equity cause No. 1835, Equity Docket 10, of the Supreme Court of the District of Columbia; and he identified as his, the signature to the answer filed in said cause, and stated—"I make the same explanation as to the apparent inconsistency as above referred to."

The attention of the witness was also called to another suit in equity in said court, instituted against him by said Samuel P. and Austin P. Brown, No. 1928, Docket 10, of the Supreme Court of the District of Columbia, and he identified as his, the signature to the answer therein; his attention was also called to equity suit No. 6723, Docket 19, in the Supreme Court of the District of Columbia, instituted against him

by Maria L. Jewett, and he identified as his the signature to the answer therein. Record, Vol. 3, pp. 1122–3.

The bill filed in cause No. 1835 (Record, Vol. 7, p. 2351) avers (Par. 3) that Robert Morris was seized of square west of 471—

> "together with certain wharf and water rights, privileges and other hereditaments thereunto belonging and appertaining;"

and that on December 14, 1798, he conveyed to Joseph Ball and Standish Forde as tenants-in-common; and that one Andrew Rothwell acquired the undivided moiety of said Forde on October 17, 1862, and that the defendant Rapley, on October 17, 1862, acquired the other undivided moiety, and that, to the exclusion of Rothwell, said Rapley had collected rents, etc.; that complainants had purchased from Rothwell his interest in said rents; that on April 1, 1866, complainants had rented a part of said square—

> "and of the wharves and wharf privileges belonging and appertaining thereto from the said defendant Rapley";

that defendant had instituted a suit against complainants to recover certain rents and had obtained a judgment, and had instituted another suit against them to recover other rents, which was now at issue; the bill prayed that an account might be stated, offsets made, etc.

Defendant, Rapley, in his answer to said bill, filed, December 7, 1869, admits that Robert Morris was seized of square west of 471, and that he conveyed to Ball and Forde; he then avers:

> "But I deny that there was at the date of said conveyance, or that there now are, any wharves, or water rights appurtenant to the said square or parcel of ground, or that any such rights were conveyed or intended to be conveyed by said Robert Morris."
>
> . . .

And (Par. 8):

> "I aver further and say that I hold the said square or parcel of ground by conveyance from Charles De Selding as above mentioned; and that I hold the said wharves and water rights by grant from the Government of the United States by conveyance from its authorized officer, a copy of which said conveyance is herewith annexed, marked '*Exhibit W. W. R. No. 2*,' and made part of this answer. And I aver, further, and say that the said wharves and water privileges are separated from the said square or parcel of ground by the street known as Water street, duly laid down on the plan of the said city of Washington; and that the said square is wholly separated by said street from the Potomac River, and that the said square does not extend to the water."

The grant from the United States referred to in said answer is a license from the Chief of Engineers, U. S. A., dated January 31, 1868, authorizing said Rapley to erect and maintain two good and substantial wharves extending into the river "from the water side of Water street," opposite square west of 471. Record, Vol. 3, p. 1121.

The bill filed in said cause, No. 1836 (Record, Vol. 7, p. 2357), prays for a partition, etc., averring title to the square, together with water rights, etc., as in cause No. 1835, and that said Rothwell had conveyed to complainant an undivided moiety of the square on December 27, 1867 (1887 in Record is a misprint).

In paragraph 6 it is averred:

> "That the said parcel of land and premises include, besides the square of ground and usual appurtenances to the city lots, certain incorporeal hereditaments, to wit, wharf rights and privileges, water and water rights, and rights of accretion; and also certain wharves and other buildings; and that the same are susceptible of partition."

Defendant Rapley in his answer (Record, Vol. 7, p. 2359) to this bill filed November 10, 1869, admits the ownership

of the square by Morris and his conveyance of the same to Ball and Forde, but says:

> "I do not admit that there are any water rights appurtenant to said square or parcel of ground, or that the said Robert Morris conveyed any such water rights as alleged."

And in paragraph 6 says:

> "I deny that the said parcel of land and premises include, beside the square of ground and usual appurtenances to city lots, water rights and privileges, waters and water rights, and rights of accretion, and also certain wharves and other buildings. On the contrary, I aver that said wharves and riparian rights are totally distinct from and independent of said square or parcel of ground, and are held by totally distinct and different titles. I deny that there are any water rights appurtenant to the said square or parcel of ground; and I aver and say that, by the original plan of said city, said square is bounded on the side next to the river by a street known as Water street, and that said square does not extend to the water. And I aver, further, and say that the wharves and buildings in front of said square and being between said Water street and the Potomac River, and between 7th and 8th streets west, were either wholly or in part erected by me, or in part by me purchased from the government of the United States; and I hold the whole of said whaves and water privileges by grant from the said government, by conveyance from its authorized officer, a copy of which said conveyance is herewith annexed, marked Exhibit W. W. R. No. 2, and made part of this answer; and I deny that the complainant has any title whatever thereto, except as my tenant."

The bill filed March 16, 1870, in the cause No. 1928 (Record, Vol. 7, p. 2362) prayed for an injunction to restrain defendant Rapley from proceeding at law to enforce the judgment already recovered against complainants or to obtain others on account of rents based on the relations of

the parties in regard to square west of Square 471, and in it the averment is renewed that Morris was seized of said square "together with certain wharf and water rights, privileges and hereditaments thereunto belonging and appertaining," and that he conveyed the same to Ball and Forde; and again defendant Rapley denies in his answer (Par. 10; Record, Vol. 7, p. 2369);—

> "that there were at the date of said conveyance, or that there are now any wharves or water rights appurtenant to the said square or parcel of ground";

and (Par. 22) again avers (Ib., p. 2372):

> "that the said wharves and water privileges are separated from the said square or parcel of ground by the street known as Water street, duly laid down on the plan of said city of Washington; and that the said square is wholly separated by said street from the Potomac River and does not extend to the water."

In the bill filed April 10, 1879, by Maria L. Jewett against said Rapley (Record, Vol. 7, p. 2374), complainant avers that she is the owner of five-twelfths and the defendant of seven-twelfths of square west of Square 471—

> "with the wharf privileges thereunto appertaining, and prays for a partition of the said square and wharf property appurtenant thereto."

The defendant in his answer (Record, Vol. 7, p. 2377), filed May 23, 1879, again denies (Par. 2), "that there are any wharf privileges appurtenant to said square"; and (Par. 6)—

> "He admits that said square, as well as several other squares in the city of Washington, is separated from the Potomac River by a street designated as Water street; and that the wharf property referred to by the complainant lies between said Water street and the Potomac River, opposite said square. The defendant believes that it is true, as stated by the

> complainant, that the District of Columbia and the United States of America have set up claims to said wharf property in the said city similarly situated, *and the defendant has been advised that there is good reason to suppose that the claim of the United States to the same is well founded.*"

Comment on the claim now set up by the appellant, Rapley, against the United States in this case would seem to be unnecessary.

The Particular Claim of Appellant, J. H. Johnson.

The Record shows that J. Harrison Johnson obtained a license under date of January 31, 1868, from the Chief of Engineers, U. S. A. (Rec., Vol. 1, p. 218)—

> "to build, erect, keep and maintain two good and substantial wharves on the Potomac River in said city not less than eighty-four feet wide and to extend from the water side of Water street between 9th and 10th streets west to the channel of said Potomac River,"

which license he assigned to O. S. Baker on February 28, 1868. At the time Mr. Johnson obtained this license he was not, so far as the Record discloses, the owner of any part of the squares between said Ninth and Tenth streets, and having Water street for a boundary.

Evidently Mr. Johnson, at this time, did not believe that the owners of squares or parts of squares fronting on the easterly side of Water street were vested by law with any exclusive wharfing right in the river from the westerly side of Water street, opposite such squares and parts of squares; yet, in the case at bar, as a member of the firm of J. H. Johnson & Co., he is asserting such right in E. Kurtz Johnson, one of the members of said firm, and the owner of Square 300.

In paragraph eight of the answer of J. H. Johnson & Co. (Record, Vol. 1, p. 157), it is averred:

> "These complainants further show that by the

terms of the aforesaid deed in trust from the said Notley Young to the said Beall and Gantt it is manifest that the streets of the city of Washington, including, of course, said Water street, were conveyed upon no express consideration whatsoever, and that the only implied consideration for such conveyance was the mutual benefit and advantage therefrom and from their perpetual use as thoroughfares resulting to the complainant and to the said grantor and his heirs and assigns; and that the policy which dictated the laying out of a Water street near the river front was confined on the part of the Government to sanitary considerations, and on the part of the proprietor to the more convenient exercise of his riparian right, *and that at the time of said conveyance it was not contemplated by the Government to appropriate, nor by the proprietor thereby to part with, said riparian right to any extent whatever*;—

and that (paragraph 9)—

> "these respondents, in the full assurance that they were the rightful owner of said wharves under and by virtue of the water privileges annexed, as aforesaid, to the aforesaid proprietorship by their said co-respondent of said square of ground, have erected extensive warehouses"—

on the north wharf aforesaid, etc.

Claims of Moncure Robinson Et al. and of The Washington Steamboat Company, Limited.

The appellants, Moncure Robinson *et al.* and the Washington Steamboat Company Limited, are the only ones remaining of this class; the claims made by them and set forth in their respective answers will now be considered.

The answer of the defendants, Moncure Robinson et al. (Record, Vol. 1, p. 260), denies—

> "that the land and water in the District of Columbia affected by the improvements of the Potomac River and its flats, in charge of the Secretary of War, are comprised within the metes and bounds set forth in the third paragraph of the said bill;"

and that "the improvements of the Potomac or its flats," which by the act of Congress are contemplated as being "in charge of the Secretary of War," are such improvements only as are indicated—

> "in and by the plan and report made in compliance with a certain act of Congress commonly known as the River and Harbor Act, approved March 3, 1881, and in and by the reports of the Board of Engineers, made in compliance with a certain resolution of the Senate of the United States adopted on the 31st day of December, 1881,"

from which the metes and bounds described in the bill are different.

The answer states that defendants—

> "have no reason to doubt, and, therefore, admit that the metes and bounds set forth in the said third paragraph are the true metes and bounds within which the Secretary of War and the Attorney General suppose,"

the said improvements to be comprised.

The defendants deny that the map "Exhibit B" to the bill of complaint represents the metes and bounds of said land and water, and deny that—

> "the said map is a true copy of any map heretofore adopted by competent authority as or respecting that part of the city of Washington and of the Potomac River adjacent thereto shown upon said exhibit;"

they—

> "admit, however, that the said exhibit properly and correctly represents the metes and bounds of the land and water which the said bill in the third paragraph thereof claims to be affected by the improvements of the Potomac River and its flats, in the said paragraph alleged to be in the charge of the Secretary of War."

In the eighth paragraph of the answer it is denied that the city of Washington "ever extended, or does now extend, to the main channel of the Potomac River"; and the limits stated in the deeds of the original proprietors and in the Maryland act of December 13, 1791 are given as such limits; and in the same paragraph the preparation of the earliest plan of the city of Washington by Major L'Enfant, in 1791, and the preparation by Major Ellicott of the next plan of the city, in 1792, which became known as the Engraved Plan, is averred; and that—

> "an important and valuable feature of the 'Engraved Plan,' which was extensively circulated by the Commissioners, both at home and abroad, and held forth by them as the basis and inducement to private investments in said city, was that which exhibited a series of wharves upon the Potomac River, between the present sites of the Long Bridge and the Arsenal grounds, opposite the lots lying on the street intervening between themselves and the said river, as represented upon the said plan, a true copy whereof is herewith filed marked Exhibit 'M. R. No. 2'"

It is then averred that—

> "the introduction of this feature into the Engraved Plan was intended by the Commissioners, and was fully understood, as well by themselves as by the general public, to indicate, *and to express by contract*, that the said lots were entitled to the privileges of wharfing into the said river opposite the said lots. The said 'Engraved Plan' carried the boundaries of the said city no further than the boundary of the street intervening as aforesaid, between the said lots and the said river."

The request of President Washington to the trustees, of March 2, 1797, for a conveyance of the streets of the city and public appropriations therein, according to a plan described as annexed to the request, is then averred; and it is

further averred that the plan referred to, which had been prepared by James R. Dermott, had been executed—

> "for the purpose of connecting the channels of the Potomac and the Eastern Branch with the squares in the city particularly by running a water street on the southeast of Carrollsburgh on the bank of the Eastern Branch and permanently establishing, as well as regulating, the right of wharfing beyond such street into the channel by lines drawn parallel to the prolongation of streets running easterly, and terminating in said Water street, according to the regulations which he conceived had been already adopted in respect to the rest of the city, the building regulations of July 20, 1795, hereinafter to be noticed being in full force at the time of the preparation of the said plan."

It is then averred that in the state of business incident to the close of President Washington's administration, the actual annexation of Dermott's Plan to the President's request had been accidentally omitted, and that the request was renewed on July 23, 1798, by President Adams in an instrument to which the plan was in fact annexed; that this plan of the city since the date of said request—

> "has been known and commonly designated as 'The Washington Map,' and except as to Water street, as defined in 1839, as hereinafter mentioned, under the approval of President Van Buren, has constituted the only lawful and authentic plan of the said city in force therein."

It is then averred that the incompleteness of this plan as to Water street, and the failure of the building regulation of July 20, 1795, led to inconvenience and confusion—

> "amongst the owners of private property on Water street *claiming the right of wharfing as appurtenant to such property*";

and that this led to the preparation by William Elliott,

surveyor of the city, of a plan according to a system suggesed by him as—

> "the best for securing the water privileges in the most equitable manner, amongst those who own property on Water street, as well as securing the public rights, by increasing the width of Water Street to not less than one hundred feet in its narrowest portion, and assigning to the lots held by private persons and fronting upon the said streets, definite wharfage fronts upon the southwesterly side of said street in the said river";

and that this plan became known as "Plan No. 2" of said Elliott, and that on February 22, 1839, said plan was adopted by the city councils of Washington and approved by Peter Force, then Mayor of the city, and that on the same day it was approved by President Van Buren, and that thereby, "the plan of the said city as to Water Street, was fully, precisely, and finally fixed and determined."

This paragraph (8) further avers that under the compact between Virginia and Maryland of 1785, the exclusive privilege of wharfing out into the Potomac River was vested, on the south bank thereof, in the Virginia proprietor, and on the north bank thereof in the Maryland proprietor, and that in the Maryland act of cession of December 19, 1791, it was expressly provided that nothing in the act contained—

> "should be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same should or might be transferred by such individuals to the United States. And complainant is advised, and so charges, that the only right of property at any time enjoyed or possessed by or vested in the United States in or to the shores of the Potomac river, or in or to their emoluments, advantages, rights, privileges, or appurtenances, was so enjoyed, possessed, or vested, under and by virtue of, and agreeably to, the terms of the said conveyances from the original proprietors, and that any

> interest in the land and water in the said river opposite or adjacent to the said city acquired, under the said cessions by the Congress and Government of the United States, was so acquired, subject and subordinate to the exclusive privilege of wharfing out into the river vested and existing by law in the proprietors of such adjacent shores at the times of such cessions."

In the thirteenth paragraph the respondents claim and set forth that they are entitled to the land and water embraced "in the site of the riparian privilege" assigned to Square No. 472 in the said city, according to the Elliott Plan, upon which they maintain and occupy certain wharves; and the respondents set forth and claim (Par. 14) that, under license granted by the Commissioners March 5, 1795, to Notley Young, the original proprietor of Square 472, and under the Building Regulations of July 20, 1795, the said Young erected in that year a certain wharf upon the site where now stands the wharf belonging to the respondents; and that—

> "they, under mesne conveyances from the said Notley Young, the original proprietor of said square, have right, title, interest, and claim to the said site whereon said wharf and the improvements connected therewith, as shown on Exhibit 'M. R. No. 4,' are built, *for the purpose of wharfage, and to the said wharf and improvements themselves, by reason of the annexation of riparian privileges to the said square, when the same, as hereinafter mentioned, was assigned to said Notley Young.*"

Similar wharfing rights and privileges are claimed by the respondents (Pars. 16, 17, 18 and 19), as incident to their ownership of lots in Squares 473 and 503 and to wharves occupied by them opposite said squares.

The respondents then aver (Par. 20) the ownership by Notley Young at the time of the establishment of the seat of government, of part of Duddington Pastures, lying on

the river, and now forming part of the city, and that said Young was vested with full property in the shore of the river adjoining his land and with the privilege of making and carrying out wharves and other improvements, and that on December 24, 1793, and while the Engraved Pan—

> "was the sole, lawful and authentic plan of said city, and before any division had been made of the property of said Notley Young, between himself and the public, agreeably to his conveyance in trust, the said squares numbered 472, 473 and 503, respectively, all of which were carved from said 'Duddington Pastures,' were returned by the surveyor, as bounded upon Water street, towards the southwest."

And that on the day of such return the Commissioners entered into a contract with James Greenleaf and Robert Morris, which recites "that the said Commissioners have sold and contracted for the sale and conveyance . . . and do hereby . . . sell and contract for the sale and conveyance" to said Morris and Greenleaf . . . of 6,000 lots, . . . 4,500 to lie to the southwest of Massachusetts Avenue, . . . and that of such 4,500 lots the said Morris and Greenleaf "shall have the part of the city in Notley Young's land;" and that said contract contained the following proviso:

> "Provided, nevertheless, and it is hereby agreed, by and between the parties to these presents, that the said Robert Morris and James Greenleaf are entitled to the lots in Notley Young's land, and, of course, to the privileges of wharfing annexed thereto, and that lots adjoining the canal are not reckoned water lots."

And that—

> "*At the date of this contract there was no square opposite the Potomac River carved from the land of Notley Young which was not upon the returns of the surveyors bounded towards that river by Water street.*" [Italics ours.]

And that on October, 18, 1794, there was a division of the property of the said Notley Young between himself and the public agreeably to his conveyance in trust; that on this division it was stipulated by Young and the Commissioners—

> "that any error in calculation, or otherwise occurring in such division should, when ascertained, 'be corrected and the division made perfectly equal and just,'"

and that—

> "on this division said square 472 fell to said Notley Young, and under the contract aforesaid squares No. 473 and No. 503, respectively, to said James Greenleaf, the transfer to Greenleaf alone being afterwards ratified in writing by Mr. Morris, his co-contractor."

The answer (Par. 20) further avers (Record, Vol. 1, p. 280):

> "The equitable division between the public and the original proprietors of the property of the latter, prescribed by the said deeds of trust, and the said special engagement made by the Commissioners with Notley Young, upon the partition of his property, on October 18, 1794, were, in fact, carried into honest effect by the Commissioners, by apportioning with his land the riparian privileges which were understood at the time to be connected with the land, and to constitute its highest value. In all of those squares carved from the land of the said Young, and lying on the Potomac, which were *divided* between himself and the public, including said Squares Nos. 472, 473, and 503, the *water* front as well as the land itself entered into the division. But as to such squares of the said Young, similarly located, as, under the provisions of his deed in trust *he retained*, upon payment at the rate of £12, 10*s* per acre *for his improvements* and the like, there was no entry either of water frontage [or] of square contents, because, as squares of that description were not included in the *divisions* made between said Young and the public,

they did not enter into the *accounts of divisions* between himself and the public. Hence, also, the said Commissioners entered and assigned upon their records of divisions with the said Young *to square* 472 '314 *feet* 3 *inches water front;*' *to square* 473 '633 *feet* 4 *inches water front,*' and *to square* 503 '522 *feet* 2 *inches water front*'—the said *water fronts* being co-extensive with the boundaries of said squares on Water street."

The Washington Steamboat Company, Limited, adopts and makes part of its own answer, *mutatis mutandis*, the answer of Moncure Robinson et al., just referred to; the specific claim of the company is to wharves and wharfing rights incident to its ownership of part of square 473.

A noticeable difference in the positions of these last mentioned appellants and of the appellants, Willis and others, first referred to, is that while said Willis and said others deny that said Water street became a street of the city under the deeds in trust, the appellants, Moncure Robinson et al. and the Washington Steamboat Company, Limited, concede that said Water street did become such street.

The averments of fact which are made in the answers of said last mentioned appellants and which are not specifically made in the answers of the other appellants in this class, which will now be noticed.

These averments are:

1. That the limits and boundaries of the improvements of the Potomac River and its flats, in charge of the Secretary of War, as set forth in the bill of complaint, are not the limits and boundaries of such improvements as contemplated by the River and Harbor Act of March 3, 1881, and by the reports of the Board of Engineers made in compliance with the resolution of the Senate of December 31, 1881; although it is admitted that the limits and boundaries set forth in the bill are the true metes and bounds within which the Secretary of War and the Attorney General suppose the said improvements to be comprised.

In reply to this it may be said that section 3 of the River and Harbor Act of March 3, 1881, provides:

> "That the Secretary of War is hereby directed at his discretion to cause examinations or surveys, or both, and estimates of costs of improvements proper to be made at the following points, namely:
>
> . . . . . .
>
> "Potomac and Anacostia Rivers in the vicinity of Washington, District of Columbia, with reference to the improvement of navigation, the establishment of the harbor line, and the raising of the flats, so far as their improvement may be necessary to the improvement of navigation and the establishment of the harbor line."

Under date of March 8, 1882, the Secretary of War transmitted to Congress a report of S. T. Abert, U. S. Civil Engineer, made to the chief of engineers, and prepared in compliance with the requirements of the Act of March 3, 1881 (Ex. Doc. No. 126, 47th Congress, 1st Session).

On December 13, 1881, the Senate adopted the following resolution (Cong. Rec., Vol. 13, Part 1, 47th Congress, pp. 78–79):

> "Resolved, that a select committee, consisting of five Senators, be appointed, whose duty it shall be to inquire and report as to the condition of the Potomac River in front of the city of Washington, the navigability of said river, the effect of bridges across the same upon navigation, floods and the health of the city, and what action ought to be taken in the premises; and that for the purposes of such investigation the committee shall have power to send for persons and papers, to examine witnesses and to employ a clerk and stenographer, if necessary."

On January 26, 1882, the Secretary of War convened a Board of Engineers—

> "to consider and report upon the plans and estimates for the improvement of navigation of the Potomac

> River in the vicinity of Washington, D. C., the raising of the flats in front of the city, and the establishment of the harbor lines;"

and the chief of engineers transmitted to the board, for its "information," the report of Mr. Abert, and stated that if the presence of Mr. Abert was necessary he would attend the board. The chief of engineers also suggested that the board request the attendance of Major W. J. Twining, Corps of Engineers and Engineer Commissioner of the District of Columbia, who had also prepared a plan and a report upon the subject.

The Board of Engineers made a preliminary report on February 18, 1882, which was submitted to Congress and a select committee of the Senate was appointed to investigate and report as to the condition of the Potomac River in front of Washington. The testimony taken by this committee was published in Sen. Misc. Doc. 133, 47th Congress, 1st Session.

By the Act of Congress of August 2, 1882, an appropriation of four hunderd thousand dollars was made for—

> "Improving the Potomac River in the vicinity of Washington with reference to the improvement of navigation, the establishment of harbor lines, and the raising of the flats, under the direction of the Secretary of War, and in accordance with the plan and report made in compliance with the River and Harbor Act of March 3, 1881, and the reports of the Board of Engineers made in compliance with the Resolution of the Senate of December 13, 1881."

The Board of Engineers reported in favor of—

> "an improvement which shall combine substantially and in its essential features the harbor and shore lines of Mr. Abert's plan from Easby's Point to the Arsenal . . . with Major Twining's high grade filling and sluicing ponds between the Long Bridge and Easby's Point," etc.

In a report of Major Hains, Corps of Engineers, U. S. A., being, "Appendix I," to the report of the Chief of Engineers, U. S. A., for 1883, that officer reviews at length the history of the various plans for the improvement of the river prior to the Act of August, 1882; and, under the head of "OPERATIONS FOR THE PAST FISCAL YEAR" he says:

> "The plan for the improvement of the Potomac River having been definitely fixed by law, it only remained to carry it out in such a manner as to insure the greatest benefit to commerce, to the sanitary condition of the city and to the best interests of the Government.
>
> "By Special Orders No. 188, dated Headquarters of the Army, Adjutant General's Office, Washington, August 14, 1882, I was assigned to the charge of the work.
>
> "September 12, 1882, I submitted a project for the expenditure of the appropriation. This project was approved by you in a letter dated September 26, 1882.
>
> "The appropriation had in view three objects: The improvement of navigation, the establishment of the harbor line and the raising of the flats."

In successive annual reports of the engineer officers in charge of the work, transmitted to Congress by the Secretary of War, its progress was set forth and successive appropriations annually made for its continuance.

The Secretary of War, under date of November 5, 1886, "Exhibit U. S. No. 1" (Record, Vol. 5, pp. 1–5), certified to the District Attorney the metes and bounds of the improvement, with a map of the same, as set forth in the bill; and Major Hains testified (Record, Vol. 2, p. 4), that said map correctly sets forth the area of land and water included within the improvements.

It is respectfully submitted that the correctness of the metes and bounds of said improvements is thus sufficiently established.

2. It is also averred that the map of Major Hains, "Exhibit B" to the bill of complaint (Record, Vol. 1, between pp. 14 and 15), upon which said metes and bounds are shown, is not a true copy of any map heretofore adopted by competent authority—

> "as or respecting that part of the city of Washington and of the Potomac River adjacent thereto shown upon said exhibit."

The map referred to is a copy of the plan of 1803 of Nicholas King, the authenticity of which plan has been established, as we also respectfully submit.

3. The denial averment of the bill that the limits of the city of Washington extend to the main channel of the Potomac River.

This has been considered on pages 120 to 171 of this brief; and it is there shown, as we also respectfully submit, that the boundaries of the city did extend at least to the middle of the main channel of the river. The point, however, is not material in the consideration of the claims of the appellants in this class.

4. It is averred that the introduction into the Engraved Plan of the feature of a series of wharves upon the Potomac River between the Long Bridge and the Arsenal grounds and "opposite the lots lying on the streets intervening" between said lots and the river—

> "was intended by the Commissioners and was fully understood by themselves, as by the general public, to indicate *and to express by contract* that the said lots were entitled to the privilege of wharfing into the said river opposite to the said lots."

The map upon its face does not support this contention. It was plainly intended, we submit, to indicate by this feature of the plan the portions of the river front which would be available for the construction of wharves. Such wharves are shown not only between the Long Bridge and the

Arsenal grounds but along the said Arsenal grounds and the reservation at the President's House, and involve no suggestion of the kind claimed; upon the face of the map merely there is nothing to suggest to an intending purchaser that the owners of squares facing the river would acquire any greater rights in the river than the owners of other squares.

Furthermore, there is nothing, as has been shown, in the dealings between Notley Young and the Commissioners, in carrying into effect the provisions of his deed in trust, indicating that the subject of wharfing rights ever became the subject of contract between them. The intendments of the instrument by which these dealings are evidenced, are in fact, the other way.

5. The averment made that the Dermott Plan of 1797 had been prepared for the purpose of—

> "permanently establishing, as well as regulating, the right of wharfing beyond such street into the channel by lines drawn parallel to the prolongation of streets running easterly and terminating in said Water street," etc.,

is not sustained by the face of the map or by the evidence in the case otherwise.

The object of the Dermott Plan has been sufficiently shown. All rights of the public and of Mr. Young in respect of the squares in his land had been *absolutely fixed and determined* before the appearance of Mr. Dermott's map; it neither added to nor detracted from the rights of either, and it nowhere appears that it was intended to do so, through the preparation of this map. After the rights of the public and Mr. Young had been thus fixed and determined it was not competent for the successor in title of either to squares on Water street laid out on Mr. Young's land to acquire by mere claim of its existence the right of wharfing into the river opposite their holdings.

Owners of squares, or parts of squares, bounded on all

sides by streets of the city, as shown by its plan, and wheresoever such squares might lie, acquired the same rights, and, with respect to the waters of the river, obviously stood on the same footing; there was, in the abstract, under the plan of the city, no advantage in the position of the squares merely. The rights of the public could be impaired by nothing short of an act of Congress.

6. The averment in the eighth paragraph of the answer "that any interest in the land and water in the said river opposite or adjacent to the said city," acquired under the Maryland Acts of cession, by the United States—

> "was so acquired subject and subordinate to the exclusive privilege of wharfing out into the river vested and existing by law in the proprietors of such adjacent shores at the time of such cessions,"

is conceded; but we submit that there was nothing in the said acts of cession by which Notley Young was prevented from conveying all his rights in the premises to Beall and Gantt, trustees, for what this court in the Van Ness Case states to be the "valuable consideration" of laying out the proposed Federal City upon his lands. With this conveyance Mr. Young ceased to be a riparian owner; and whether he would again become one depended upon the question whether the squares or parts of squares, shown on the plan and which might fall to him in the division provided for in his deed in trust, would have a water boundary and not be bounded on all sides by streets of the city; and, as we have seen, Mr. Young acquired under his deed in trust no squares or parts of squares, which were not bounded on all sides by streets.

7. It is averred that while the Engraved Plan "was the sole, lawful and authentic plan" of the city, and before any division had been made between Young and the public agreeably to his conveyance in trust, the Squares 472 and 473 were returned by the surveyor "as bounded upon Water street, towards the southwest"; and that on the day of such

return by the surveyor, the Commissioners entered into a contract for the sale to Morris and Greenleaf of six thousand lots in which it was agreed that the said Morris and Greenleaf, "are entitled *to the lots in Notley Young's land and, of course, to the privilege of wharfing annexed thereto*"; and that at the date of this contract—

> "*there was no square opposite the Potomac River carved from the land of Notley Young which was not upon the returns of the surveyors bounded towards that river by Water street.*"

The averment that at the time this contract with Morris and Nicholson was entered into "there was no square opposite the Potomac River" laid off in Notley Young's land, "which was not upon the returns of the surveyors bounded towards that river by Water street," is clearly erroneous. As has been shown (this brief, pages 296–7) from the evidence, there were then two sets of returns from the surveyor. The Record (Vol. 7, pp. 2138 to 2153) shows that returns had been made for a number of squares on June 15, 1793, including Squares 472 and 473, which were bounded on the southwest by the Potomac River; and that on December 14, 1793, returns of other squares had been made with a boundary on Water street; and that on December 24, 1793, returns had been made of squares and among them 472, 473, and 503, with a boundary on Water street. The last-mentioned returns were made on the day of the date of the Morris and Greenleaf contract; hence, on the day of the date of that contract there were before the Commissioners returns for squares in Notley Young's land, which were bounded in some instances "by the Potomak River," and in others "by Water street"; and that in the year following, and on June 22, 1794, the Commissioners adopted the returns for the squares in Young's land, which were bounded by Water street "according to the design of the plan of the city," and excluded those bounded by the river, and that Morris

and Nicholson's selections under their contract were made from the squares bounded by Water street.

As has been stated on page 297 of this brief, had the returns which gave certain of the squares a boundary "by the Potomak River" been approved by the Commissioners, said Morris and Nicholson might have obtained them with an apparent right of wharfage.

8. Again, it is said that, in the account of divisions between Young and the Commissioners, dated October 18, 1794, of certain squares, which is entirely by their superficial area (Record, Vol. 6, p. 150–1), the memorandum signed by the parties in regard to the account, and which reads as follows:

> "In case [of] any error in calculation or otherwise in the foregoing division, it is agreed between the parties that such errors shall be corrected and the division made perfectly equal and just,"

constituted—

> "a special engagement made by the Commissioners with Notley Young upon the partition of his property, on October 18, 1794,"

which was—

> "in fact carried into honest effect by the Commissioners by apportioning with his land the riparian privileges which were understood at the time to be connected with the land and to constitute its highest value."

It is evident that this division had no relation whatever to water rights, because the division is by square feet and the agreement to correct could only extend to errors in calculating the areas of the squares and in the additions of their respective areas and the like.

But it appears from the further averments of the answer (Par. 20), that the Commissioners, in carrying into effect the supposed agreement in regard to water rights—

> "entered and assigned upon their records of divisions with the said Young *to square* 472 '314 *feet*, 3 *inches*

water front;' *to square* 473 '633 *feet,* 4 *inches water front;'* and *to square* 503 '522 *feet* 2 *inches water* front,' the said *water fronts* being co-extensive with the boundaries of said squares on Water street."

In support of the averment that the Commissioners so "entered and asigned on their records" to said Squares 472, 473 and 503 the number of feet and inches stated as "water front" extracts were given in evidence in behalf of said appellants from two books of the early records of the city, one knows as "Division Book No. 1," and the other the "Book of Calculations and Divisions."

Nothing can be plainer than that said "Division Book No. 1" and said "Book of Calculations and Divisions" formed no part of the records of the early Commissioners, and that they had no existence prior to the year 1802 at which time the Board of Commissions had been abolished and their powers and duties had been devolved upon a Superintendent of the city.

Captain Stewart, the custodian of the early city records, being examined as a witness on behalf of said appellants, produced said "Division Book No. 1"; and, being interrogated in regard to the entries in that book in regard to Square 472, which entries appear on page 1503 of Volume 4 of the Record, stated (p. 1504) that the reference "84" in the left hand margin and under the words "Book of Calcul'n," referred to the folio or page of the "Book of Calculations and Divisions," which latter book upon request of counsel for said defendants (appellants) he produced and which showed a division of the square by square feet, but which also contained the entry "314 f. 3 i. W. F." as to Square 472; and which showed entries in connection with Square 473 made in the same way, including one of "633 f. 4 i. W. F."

The form of the account in this "Book of Calculations and Divisions" is exhibited in the lower account appearing on page 315 of volume 6 of the Record. On pages 1536 to 1540 of volume 4 of the Record will be found copies of the

entries in Division Book No. 1, in regard to Square 233, and others facing the river in Young's land.

The entries in "Division Book No. 1" appear to have been contemporaneously made, and on page 1523 of volume 4 of the Record will be found an entry in connection with Square 1067, which is dated 1804; one in connection with Square 712, (Ib., p. 1522), which is dated May 11, 1802; and another in connection with square 748, which is dated May 11, 1802; and another in connection with square 777 (Ib., p. 1523) which is also dated May 11, 1802?

Being interrogated, on cross-examination, in regard to the handwriting of "Division Book No. 1," the witness stated that he believed it to be "in the handwriting of Nicholas King," whose name he found signed to a memorandum in regard to Square 6 (Ib., p. 1526). This entry bearing the signature of "N. King" was made after the year 1800, for that date is referred to in the body of it. The witness also referred to an entry in connection with Square 22 (Ib. p. 1527), which is signed "N. K." in the body of which is the date 1800.

Captain Stewart was then asked:

> "X-Q. From the answer you made to Mr. Selden's question in regard to the authenticity of 'Division Book No. 1,' the impression might prevail, Mr. Stewart, that 'Division Book No. 1' was a record of the first Commissioners. Was that book in existence prior to 1802 or 1803?
>
> "A. I don't think it was.
>
> . . . . . .
>
> "X-Q. It is quite clear, is it not, that between time of his resignation in 1797 and the date of Mr. Munroe's letter in 1802, Nicholas King had no official connection with the city as a surveyor?
>
> "A. There is nothing to show that he had any official connection with the city or the Commissioners during that time.

"X-Q. Do not the files or records of the Commissioners show that during this interval Nicholas King was transacting business with the Commissioners' office as the agent of sundry of the proprietors of lands in the city?

"A. Yes, sir. (Ib., p. 1530.)

The witness then produced from the files of his office a number of letters from Mr. King to the Commissioners and from the Commissioners to Mr. King in support of his answer. (Ib., pp. 1530 to 1533.)

The witness (Ib., p. 1535) read the entries in the "Book of Calculations and Divisions" in connection with square west of 471, which disclose no memorandum of feet and inches "water front"; he stated (Ib. p. 1536) that the marginal reference "84" in connection with the entries in "Division Book No. 1," as to squares W. of 471, 472, 473, 503, 504 and 505, and the marginal reference "85" as to Squares 506, S. of 506 and S. of S. of 506 are to the corresponding pages in the "Book of Calculations and Divisions," and that the same was true in regard to the marginal reference "82" in connection with Squares 233, S. E. of 267, and 300 in "Division Book No. 1."

"X.-Q. Are you able to inform us when the 'Book of Calculations and Divisions' was prepared; or, are you able to state whether it had any existence prior to 1801?

"A. It is my opinion that it had no existence prior to 1801, for the reason that the date of the year of 1801 is on the water-mark of the paper of which the book is made up.

"X.-Q. You have examined the book thoroughly, have you?

"A. Yes, sir.

"X.-Q. And find the water-mark of the paper for the year 1801?

"A. Yes, sir."

It is thus conclusively demonstrated that the entries of feet and inches "water front" mentioned in "Division Book No. 1," and in the "Book of Calculations and Divisions" could not possibly have had an existence prior to the year 1801, because the books themselves had no existence until after that year; and the assertion that the Commissioners had "entered and assigned" on their record any "water front" to the squares in their partitions with Notley Young is clearly erroneous.

What significance Nicholas King attached to such entries in connection with certain squares made at the late day indicated, does not clearly appear; no reason is apparent why such entries should have have been made in connection with some squares fronting on Water street and omitted in connection with others similarly situated, or why the form of the entry in the cases of squares similarly situated should have been varied. Squares 233, S. E. of 267, and 270 all front on Water street, yet there is no entry of "water front" in connection with them in said Division Book No. 1 (Record, Vol. 4, p. 1536–7). The form of the entry in said book in connection with Square 300 is "359 f. water front"; the entry in connection with square w. of 471 is "281 f. 10 i. water front"; in connection with square 472 it is "314 feet 3 inches water front"; in connection with Square 473 it is "633 feet 4 inches water front"; in connection with Square 503 it is "522 feet 2 in. water front"; the entry in connection with Square 504 is "*Fronts 275 f. 3 i. on Water street*"; the entry in connection with Square 505 is "*Fronts 393 feet 3 in. on Water street*"; in connection with Square 506 the entry is "*Fronts 381.10 on Water street*"; the entry in connection with square south of 506 is "363.6. water front"; and in connection with square S. of S. of 506 it is "—— *f.* — *i. front on Water street*" (Ib., pp. 1536 to 1540).

Captain Stewart testified (Ib., p. 1541) that it appeared from these entries that the terms "water front," "water

street front," and "front on Water street," were used by the person who prepared the book as signifying the same thing, and that the figures of such frontage were the same as those given to the same squares on Nicholas King's plan of the city.

The whole of Notley Young's account, as it appears in the "Book of Calculations and Divisions," will be found on pages 354 to 363 of volume f of the Record; some of the entries in it are dated as late as October 28, 1800, and it is entirely by the superficial area in feet of the squares.

It may be proper to state that while many of the facts above noted as appearing in the present Record were not in evidence before this court in the "Steamboat Cases," in 109 U. S., they tend strongly to sustain the opinion rendered by the court in those cases.

We affirm that it appears from the foregoing:

1. That by virtue of the provisions of the deeds in trust, the streets to be shown on such plan as the President might approve, were to become the property of the United States in fee; that the plan of Ellicott of 1792, was prepared and engraved by the direction of the President and was by him published and promulgated as the plan of the city; that it became the general rule, in the proceedings had to carry the deeds into effect; that it was not prepared according to the "meander line" of the river, but that the river line was to be made to conform to it, and that the street now known as Water street is clearly defined and delineated upon it, for which reasons the United States are the owners of it in fee; and that it is competent for the United States to lay out on the ground, at any time, any part of the street along the shores of the city, called for by that plan, and that in doing so their right to encroach upon the river, which is their own property, is beyond question.

2. That by reason of such ownership, the United States are entitled to such riparian rights as may be attached to said street as land bordering upon the river.

3. That the approval by the President of the Engraved Plan, upon which the street is shown, was and is a sufficient approval by him of the street itself and of every other street shown upon it, and that no other approval by him of such streets was required.

4. That the deed in trust of Mr. Young operated and was intended to operate as a complete divestiture of his title to his plantation, with its appurtenances, and that under its terms Mr. Young could become only and did in fact become only a lot owner in the proposed city, with no greater rights in the streets or privileges otherwise than other lot owners similarly situated; and that he never did become a riparian owner upon the Potomac subsequent to his deed in trust.

5. That the appellants have shown no lawful title by grant, or otherwise, as against the United States, to any land exterior to the defined limits of the squares bounded by the easterly side of Water street.

6. That each and all of these propositions are sustained to the fullest extent by the decisions of this court in the case of Van Ness in 4 Peters, and in the Steamboat Cases in 109 U. S., and by the testimony in the present case.

CLASS 7.

The Claims made by Certain Persons Occupying Wharves Below the Long Bridge Under Licenses from the Chief of Engineers of the United States Army.

The appellants who fall within this class are:

1. Annie E. Johnson, sole devisee and executrix of E. Kurtz Johnson, Charles B. Church, William A. Wimsatt and J. Harrison Johnson, who, as partners, occupy two wharves in front of Square 300, shown on the plat accompanying the answer of J. H. Johnson & Co.

Record, Vol. 1, p. 154.

The answer avers title in E. Kurtz Johnson to said square and claims that the use and occupancy of the wharf is a riparian right attached to the ownership of the square; that one John Pettibone obtained a license dated January 18, 1868, from the chief of engineers "to build, erect, keep and maintain two good and substantial wharves on the Potomac River" in front of said square and "to extend from the water side of Water street" (Record, Vol. 1, p. 160);

> "that after some negotiation, and to forestall and prevent any possible conflict or disagreement with the said Pettibone, as licensee under said license, the said Church procured an assignment of the same from the said Pettibone (Record, Vol. 1, p. 161), and that the respondents have since claimed and occupied said wharves or moles as well by virtue of the right of riparian ownership vested in the respondent E. Kurtz Johnson by reason of ownership of said square of ground as by the aforesaid assignment to the respondent Church of the said license or permit to the said John Pettibone."

2. Charles B. Church, William H. Yerkes, Charles W. Church, Melville Powers and Joseph J. Darlington, trustee, surviving partners, lately trading as the Independent Ice

Company, Charles B. Church and Joseph J. Darlington, trustees.

The Independent Ice Company, in its answer (Record, Vol. 1, p. 216), avers that it is in occupation of two wharves and other improvements "standing on land and water south of Water street opposite lot 2, Bradley's subdivision of square 391," as tenants of the heirs of Mary A. S. Kimmell, whose answer is referred to and made part of the company's answer and whose title and rights as owner of said lot are relied on.

The answer of the company further avers that during their tenancy, and about the year 1882, they obtained an assignment of a license dated January 31, 1868, granted by the chief of engineers, to J. H. Johnson "to build, erect, keep and maintain two good and substantial wharves on the Potomac River," extending from the "water side of Water street between 9th and 10th streets west"; and that they have used and occupied said wharves, relying upon the title of the heirs of said Kimmell and upon the license so assigned.

3. Daniel S. Evans, who in hjs answer (Rec., Vol. 1, p. 253) avers that he is the owner of square south of Square 415, "and of the riparian and wharfage rights on the Potomac River fronting said square as appurtenant thereto;" and that John O. Evans, his predecessor in title, built a stone wharf in front of said square which is now in possession of the respondent.

Although no authority for the occupancy of said wharf under a license from the chief of engineers is averred in the answer, Mr. William F. Mattingly testified, on behalf of the defendant, that prior to the construction of said wharf a license had been obtained from the chief of engineers, and Mr. Mattingly produced his letter book containing copy of a letter to John O. Evans, dated July 10, 1875, in which it was stated that "the license for wharf from the United

States" had been delivered to Mr. Evans on October 10, 1872 (Record, Vol. 3, p. 1040).

A license from the chief of engineers, dated June 27, 1883, was given in evidence by which "the heirs of the late John O. Evans" were authorized—

> "to keep and maintain one good and substantial wharf on the Potomac River in said city opposite to the western side of square south of Square 415 . . . and extending into the Potomac River from Water street."

4. William W. Rapley, who in his answer (Record, Vol. 1, p. 256) avers that he is and has been since 1864 the owner of square west of Square 471—

> "together with the water and riparian rights and other privileges and easements thereunto appertaining and lawfully belonging."

While claiming the privilege of wharfing in front of the square, the answer does not aver the existence of any wharf; but the defendant, being examined as a witness in his own behalf, testified (Record, Vol. 3, pp. 1115–6) to wharves constructed by him along the river at or in front of this square since he became the owner of it, as follows:

> "I built one new wharf at what is called the 8th street end of the square, and I added to the old wharf that was at the 7th street end of the square a sort of a dock. I used those two wharves until the Government leased the wharf at the 7th street end from me and built several wharves—I don't know how many, but they built almost up to the 8th street end of the square—and at the close of the war I bought all the wharves and buildings that the Government had put there.
>
> "Q. Have those wharves at any time been destroyed by flood or otherwise since 1864?
>
> "A. Yes, sir; they were almost totally destroyed in the last big freshet, I think probably in 1881 and 1882.
>
> . . . . . .

"Q. By virtue of your ownership of this square, what claim have you made to the riparian rights to the river in front of the square?

"A. I have always claimed it. When I bought the square it was a question that did not seem to be doubted. I bought it with the idea that it carried riparian rights with it, and everybody was using the river front with that idea."

The witness further testified that for the construction of the wharves he obtained licenses from the Mayor of the city and from the Chief of Engineers. On cross-examination (Record, Vol. 3, p. 1121) the witness identified "Exhibit W. W. R. No. 2," filed with the answer of the witness in equity cause 1835 as a license issued to him by the Chief of Engineers; this license (Ib. 1121) is dated January 31, 1868, and grants authority "to build, erect, keep and maintain two good and substantial wharves on the Potomac River," extending—

"from the water side of Water street between Seventh and Eighth streets west into the Potomac River."

So much of the claim made by said defendants to construct and maintain the said wharves as a riparian right incident to the ownership of the ground across Water street and opposite to them has been considered in the portion of this brief devoted to the claims falling in *Class 6*.

The Chief of Engineers had no Authority to Issue said Licenses.

The question of the right of the Chief of Engineers of the Army to issue licenses, authorizing the construction and occupation of wharves along the river front of the city of Washington, was considered by the court below in the case of The District of Columbia *vs.* J. H. and E. K. Johnson, reported in 3 Mackey, 110.

The court in its opinion refers to the various laws of the United States and of Maryland bearing upon the question of the erection of wharves in the city of Washington, as follows:

1. The Act of Congress of July 16, 1790 (1 Stat., p. 130), entitled "An Act for establishing the temporary and permanent seat of the Government of the United States," authorizing the appointment of three Commissioners with certain powers; the Act of Maryland of December 19, 1791 (Kilty's Laws), authorizing said Commissioners to license the building of wharves in the waters of the Potomac and Eastern Branch.

2. The Act of Congress of May 1, 1802 (2 Stat., p. 175), entitled "An Act to abolish the Board of Commissioners in the City of Washington and for other purposes," by which the Board of Commissioners was abolished and its powers and duties devolved upon a Superintendent to be appointed by the President.

3. The Act of Congress of April 29, 1806 (3 Stat., p. 324), entitled "An Act making an appropriation for enclosing and improving the public square near the Capitol; and to abolish the office of Commissioners of the Public Buildings, and of Superintendent, and for the appointment of one Commissioner for the public buildings," by which the office of Superintendent was abolished, and its powers and duties devolved upon a Commissioner of Public Buildings.

4. The further Act of Congress of March 2, 1867 (14 Stat., p. 466), entitled: "An act making appropriations for sundry civil expenses of the Government for the year ending June 30, 1868, and for other purposes," providing for the abolishment of the office of Commissioner of Public Buildings and devolving his powers and duties upon the Chief of Engineers of the Army; under which several acts it was supposed that the Chief of Engineers was authorized to license the erection of such wharves.

The opinion also refers to the various acts of Congress constituting the charter of the city of Washington, beginning with the act approved May 4, 1812 (2 Stat., p. 721), entitled: "An act to further amend the charter of the city of Washington," the Act of Congress of May 15, 1820 (Stat., p. 583), entitled: "An act to incorporate the inhabitants of the city of Washington and to repeal all acts heretofore passed for that purpose," by which power was conferred upon the city to preserve the navigation of the Potomac and Anacostia rivers, and, "to erect, repair, and regulate public wharves and to deepen creeks, docks, and basins; and to regulate the manner of erecting and the rates of wharfage at private wharves."

And in respect of which legislation the court says:

> "This act, therefore, confers upon the city of Washington the plenary power to erect and repair public wharves. Under that it is clear that the city of Washington had the right to license the building of the wharf which is the subject of controversy in this suit. The power, then, claimed to be in the Commissioner of Public Buildings or the Chief Engineer of the Army, his successor, to issue licenses for the building of wharves would be inconsistent with the power given to the city. And, therefore, even if the power was conferred on the original Commissioners, the act incorporating the city transferred it to the authorities of the city of Washington. Therefore, in our judgment, the Engineer of the Army never had the slightest power in the world to license the erection of wharves on the Potomac and Eastern Branch."

The provisions of the Act of 1820 include private as well as public wharves.

18th Opin. Atty. Genl. 443.

It follows that those occupying and holding wharves simply under the authority of licenses given by the Chief

of Engineers are doing so without proper and lawful authority, and that the decree below as to them should be affirmed.

No error appearing in any part of the decree appealed from, it should be affirmed in its entirety.

It is proper to add, in conclusion, that in the preparation of the foregoing brief, counsel for the United States have not had before them the briefs on behalf of any of the appellants, except that of Messrs. Carlisle, Johnson and Lambert, representing some of the appellants who fall in Class 6.

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